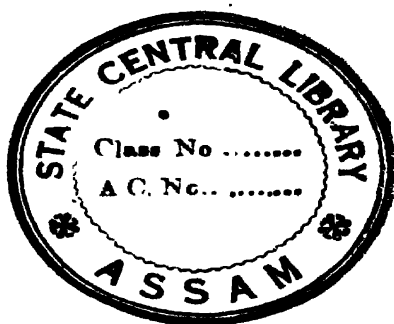


THE LAWYER



*"The picture of Law triumphant and Justice prostrate is not, I am aware, without admirers. To me it is a sorry spectacle. The spirit of Justice does not reside in formalities or words ; nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality."*—LORD PENZANCE.

*"It is difficult, when you have grown up with a system, to see that there is anything fundamentally wrong with it."*

JUDGE PARRY.



# THE LAWYER

## OUR OLD-MAN-OF-THE-SEA

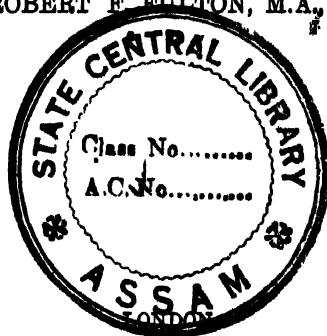
BY

WILLIAM DURRAN

WITH A FOREWORD

BY

SIR ROBERT F. EULTON, M.A., LL.D.



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## FOREWORD

BY

SIR ROBERT F. FULTON M A., LL.D.

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND FORMERLY JUDGE  
OF THE HIGH COURT OF JUDICATURE, CALCUTTA

THE author of the following pages criticizes in forcible and incisive terms the legal systems of England, India, and America. These systems are closely connected together—the Indian being directly founded on the English, and its defects being merely those of the English system, though in an exaggerated and distorted form; while the administration of criminal justice in some parts of America, which follows at least the forms of English law, affords a melancholy illustration of what may happen in this country if legal reforms are not speedily introduced.

The author has invited me to indite a 'Foreword' to his volume, as he considers that my long judicial experience in India may afford some support to what he has written in these pages; and it is in the hope that this may be so that I have acceded to his request, though I foresee that it may appear to some of the members of the legal profession in England that my more than forty

years' judicial career in our greatest and best-governed dependency scarcely affords a sufficient excuse for my doing so (see Appendix S, p. 447).

The author considers that the main defects of the legal system of England are (1) its technicalities, inherited from an antiquated and obsolete procedure, which have been crystallized into a rigid form by a precedent-bound Bench, are constantly being added to by an ingenious Bar, and make for the most part for injustice and the escape of the wrong-doer; (2) its costliness, which deters even the wealthy from the laudable course of applying to Courts of Law for the settlement of their disputes, and in the case of the poor too often amounts to a denial of justice and redress; (3) the protracted nature of the proceedings in even the simplest action at Law—a waste of life as well as of money; (4) the Trade Unionism of the members of the different branches of the legal profession which tends to render them averse from inquiries into the shortcomings of the Law, and disinclined to favour attempts at its reform; (5) the Jury system, which converts the advocate from being, as he should be, a fair-minded friend of the accused, prepared to do the best that can honestly be done for him, into a blind partisan, and sometimes a stage-player and a trickster, whose object is to gain the cause of his client at all costs and by all means—and in the case of the guilty and fraudulent to defeat justice; (6) the uncertainty of the Law arising from the want of codification, and its conflicting developments according to the varying idiosyncrasies of individual

Judges ; (7) the selection of our Judges from the ranks of the successful but elderly Bar, who cannot but be wanting in the habit of impartial and unbiased judgment, and whose salaries and pensions are far more than need be paid, and much in excess of the real value of their services : and (8) the political bias often exercised in the appointment of our Judges, which they naturally feel themselves and from which they often, unconsciously it may be, are subject to, during the whole of their after career on the Bench.

Other minor defects, according to the author, are to be found in the want of official copies of judgments, the treatment of spendthrifts and illegitimate children, and our marriage laws.

Ample evidence in support of all the author's views is to be found in the Appendices of this book, which consist of accounts of flagrant instances of miscarriages of justice and acts of injustice due to our English legal system, which lawyers may make merry at, but which must madden the victims, and make all honest-minded men and lovers of justice feel shame.

Most of these defects and many others exist in the legal system we have introduced into India. The technicalities of the Law, if not at present as great in India as in England, and which the subtle-minded Indian lawyer luxuriates in, tend to increase. Legal proceedings are protracted to a much greater extent in India than in England. Trials and actions take months, when in England, where the Judges are mostly strong and often peremptory, they would take only days. Even

When of the most trifling importance and instituted in the most subordinate Courts, they are never decided until after repeated and unnecessary postponements. This is due partly to the abnormal number of dilatory processes, such as appeals from interlocutory orders, and applications for revision provided for in the Indian Codes of procedure, or applications under the High Courts Charters, when no appeal or application for revision is allowed by the Law; and partly to the weakness of the Indian Bench, which seems unable to control the Bar, to check the raising of unnecessary issues, the endless and useless cross-examination, or the interminable speeches made before it. A considerable portion of the members of the Indian Bench are selected from the ranks of the junior Bar of England, not always for merit, but sometimes from motives of interest, or as a reward for political services. Even when the Judges are appointed locally from the ranks of the successful Indian Bar, considerations of race and religion are allowed to affect the appointment.

The cost of legal proceedings in India is great, and continues unceasingly to increase. The fees paid to successful practitioners, both English and Indian, are phenomenal.

Juries in India are not so supreme as in England. Except in the Presidency towns, there are means of setting aside their verdicts, and of correcting their vagaries. But the arts of the advocate are, as in England, too often directed to misleading the Juries, to blinding Justice, and to leading astray its halting steps.

Law is more codified in India than in England, and legislation to remedy any patent defect is easy and swift; but unfortunately in India the preparation and the passing of the laws is entirely in the hands of the executive. They permit no interference from the Judiciary or the legal profession, who may advise but cannot control. The drafting of Acts of the Indian Legislature is, therefore, far from perfect.

I have no experience of America, and cannot speak of the defects of its legal systems at first hand. The author of this volume, however, shows that in America Criminal Justice can be defeated by the rich; that murder and crimes of violence, particularly when perpetrated by the wealthy, often go unpunished; that the appointments of Judges are largely influenced by political considerations, and as, except in the Federal Courts, they are seldom life appointments, the American Judges are not free from political bias, and on occasions have yielded to political influence; while in some cases, it is to be feared, they have been actuated by even baser motives.

All this affords matter for grave reflection and concern.

R. F. FULTON.

7 SLOANE GARDENS, S.W.,  
*January 1st, 1913.*





## PREFACE

FOR the benefit of those of my readers who may be disposed to resent the intrusion of a layman among the arcana of the Law, I translate a short Italian story :

Once upon a time there lived in Pisa an elderly gentleman whose windows looked on the famous tower. Through long gazing on this striking object during a tedious convalescence, he conceived the idea (which deepened into a delusion) that the tower was perpendicular and all other buildings were leaning. To the amusement of his friends he had the floor of his rooms relaid so that the furniture was tilted into lines parallel with those of the tower. He was dilating on his fixed idea one afternoon when he had visitors ; one of the party, a kindly old priest, seeing a grandchild of the invalid playing along the corridor, called out to him :

‘ Beppino ! Come to me.’

The boy was a special favourite of the old man. Placing the boy on the table with his face to the tower, the priest said :

‘ Carissimo Signor Conte ! Are you content to let Beppino decide ? ’

‘ Dear little man,’ said the grandfather,

'kissing the brown locks. 'You shall settle it. Look!'

'Look, Beppincino, at the tower!' said the priest, laying his hands lightly on the child's shoulders; 'is it straight?'

'E certo che s'inchina.' 'Of course, it leans,' said the child without the slightest hesitation.

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## CHAPTER I

### THE ADVOCATE

‘An advocate, by the sacred duty of his connection with his client, knows in the discharge of his office but one person in the world—that client and no other. To save that client, at all hazards and costs to others, is the highest and most unquestioned of his duties.’—*Lord Brougham’s Speech in the House of Lords.*

**S**CRATCH the Lord Chancellor and you find the special pleader! You find him in a fine frenzy of professional zeal. He is inspired. He promulgates the Magna Charta of advocacy. It is more than a charter: it is a letter of marque and a plenary indulgence all in one. Lord Brougham is the Father Tetzels of the cult. He thrusts a comprehensive Absolution into the hand of the advocate.<sup>1</sup>

Nor has the recipient failed to avail himself of the licence to the utmost. It crystallized vague pretensions. It created an atmosphere. It is the justification of ‘The Subtle Arts of Great Advocates’ in America. It is the oriflamme of flamboyant young bloods of the native Bar in India.

And no wonder. The relation of advocate to client is exalted far above that of physician to patient or priest to penitent, and pronounced

<sup>1</sup> ‘Can it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire?’—*Lord Macaulay.*

especially sacred. To save the client 'at all costs to others' receives the *imprimatur* of a Lord Chancellor of England. This is a double consecration. The interpretation favoured by the lower fringe is that the end justifies the means. To the sophist, the trapper of unwary witnesses, the hired bravo of our civilization, this is the most potent stimulant that can possibly be administered.

Nor can the effect on the *élite* be deemed negligible. The tradition which this mandate embodies and emphasizes divides the life-history of the advocate into two water-tight compartments. He is Jekyll and Hyde. Professionally he has small scruple in descending to devious ways which he scorns in his private capacity. Lord Brougham and his predecessors have much to answer for. A similar duality is called by harsh names in other professions. In the advocate it is condoned, tolerated, applauded. He is the chartered libertine of Legalism. As such our public accepts him. This is a triple consecration.

It is, moreover, the characteristic note of Anglo-Saxon civilization. In all communities brilliant forensic gifts compel admiration. So does histrionic talent. They are closely allied.<sup>1</sup> Our eccentricity consists in singling out the former for high distinction and leaving the latter to languish in neglect. Our neighbours endow dramatic art. We lavish rewards on the arts and artifices of advocacy.

<sup>1</sup> Two great advocates, Lord Brampton and Mr. Montagu Williams, hesitated between Bar and Stage in their choice of a profession.

For this singular preference we are not to blame. It is our misfortune rather than our fault. It was Hobson's choice. A foreign judiciary was imposed upon us at the Norman Conquest. They spoke a foreign tongue.<sup>1</sup> Hence the effulgence of the advocate. He had little scope in Saxon times. The laws were simple. Litigants generally appeared in person. Law and Justice were living in unity. The Conquest pronounced a decree of divorce and they have been at daggers-drawn ever since.

The litigant's extremity is the lawyer's opportunity. An account of the ceremonies at the 'creation' of a Serjeant-at-law is comic opera. Nothing is too good for him. He is a grandee of England. 'Neither shall he ever put off the coif, no, not in the King's presence, though he be in talk with his Majesty's Highness.'

Nor is the recognition of the Church lacking. The idol of the nation has a pillar assigned him in St. Paul's, where he confers with solicitors on consecrated ground. The association is significant; but advocacy, keenly alive to the signs of the times, tactfully sheers off from the growing unpopularity of clericalism. The Serjeants forsake their pillars. Advocacy grows and prospers henceforward on secular lines while retaining indelible traces of its early environment. Its prosperity has no parallel in the history of professionalism.

Advocates now sway the destinies of both

<sup>1</sup> See Carter's *History of English Legal Institutions*, p. 61. 'The Shire Courts were unpopular. Though most of the suitors were Saxon, the language spoken was French.'

branches of the Anglo-Saxon race. In the Monarchy the Prime Minister, in the Republic the President is a barrister. More astonishing still the heads of both fighting services are, or were recently, barristers. We found advocacy mud ; we are leaving it brass burnished to look like pure gold. Springing unarmed from what John Bull is pleased to call his head the insistent figure of the advocate now bestrides Empire and Republic, one foot in either hemisphere, a bewigged, begowned, bespectacled Colossus.

But all his minor successes pale before the crowning tribute of national idolatry—the enthronement of the advocate on the Bench. The cult of advocacy is of indigenous growth. We have had no predecessors in our devotion to it and we shall assuredly find no imitators. Our experience may well serve as a warning, not as an example.

It was an innovation to declare the advocate eligible for judicial duties. The Judge should endeavour to hold the scales of Justice evenly. The advocate, on the contrary, thrusts everything into one scale. Other communities consider this practice the worst possible preparation for the Bench. We deem it the best. Our neighbours decree that no advocate is eligible for the exercise of judicial functions. We ordain that no one but the advocate is thus eligible. This is his supreme consecration.

After the consecration the apotheosis. The censer is swung before the shrine. A great legal mandarin deprecates the suggestion that the Bench sheds lustre on the Bar. ‘No, no ; ours are

reflected rays: the luminary is the Bar.' This is the top note of the mutual admiration of Bench and Bar. It is peculiar to this country, or rather this Empire, and America. It is the harmonious echo from the discordant life of a profession which is really much less discordant than it seems.

John Bull is hypnotized by hosannahs and incense. He never fails to applaud a recital of the idyllic relations existing between the three branches of the legal mandarinat. It is true that a strong 'claque' gives him a lead. His applause does more credit to his heart than his head. Never has such a heavy demand been made on self-denial since the captive Israelites were invited to make mirth for their spoilers by the waters of Babylon.

Our neighbours hold that a separate training for the judiciary provides a salutary control on the sophistical vagaries<sup>1</sup> of the Bar. That precaution is ignored in Anglo-Saxondom. Bench and Bar are one, except as regards altitude. The flower does not admonish the plant.

John Bull's attitude to the advocate is not that of the scientific investigator to his subject; it is that of the tremulous devotee to Mumbo-Jumbo. This is fortunate for the idol.<sup>2</sup> But his luck may

<sup>1</sup> 'The enthusiast misrepresents facts with all the effrontery of an advocate.'—*Lord Macaulay*.

<sup>2</sup> 'Vanity will merge into solemnity by degrees as the profession develops in the direction of charlatanry. For it is a remarkable fact that the more questionable an art is the more disposed are its exponents to believe that a priesthood has been conferred upon them and that people should bow down before its mysteries.'—*M. Henri Bergson* in '*Le Rire*.'

change one day ; the dupe may rid his mind of cant and his atmosphere of incense fumes. It will then occur to him to ask this question :

‘ I have done a hundredfold more for you, Mr. Advocate, than any other community has ventured to do in ancient or modern times. It is time to inquire what have you done for me ? Are you my servant or my master ? ’

A perfect torrent of eloquence pours forth with appropriate gesture. There is much turgid rhetoric. Pompous asseverations are heard that John Bull’s greatness is due in large measure to the cosmic excellence of his legal system. There is much confident averment which rings false.

Disillusioned, impatient, the interrogator turns to the Time-Spirit. The answer comes :

‘ This is the chief of your false gods. He does nothing for you. He fights for his own hand.<sup>1</sup> He is the product of a period of confusion. True to his origin he says to chaos, ‘ Be thou my good.’ He opposes codification. He requires the legal tangle for lucre ; the jury system for fame ; solidarity with the Bench for licence. Look beyond the narrow seas ! They divide Byzantinism from progress.

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<sup>1</sup> ‘ Useful professions are manifestly made for the public ; but those that are of more doubtful utility can only justify their existence by supposing that the public is made for them.’—*M. Bergson in ‘ Le Rire.’*

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See Appendix A for a mass of information respecting the privileges and prerogatives of the Bar. It was found impossible to embody this in the text without swelling the book to an inconvenient size.



## CHAPTER II

### THE ADVOCATE (IN HIS CORPORATE CAPACITY)

'The advocate must not regard the suffering, the torment, or the destruction he may bring upon others: he must go on reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client.'—*Lord Brougham*.

THE peroration rises in a mighty crescendo to an appropriate climax. And what a climax! Six centuries of pampered professionalism condensed in a single sentence! The moral law is and remains repealed. The Sermon on the Mount is ignored. Even the supreme law of public safety is swept aside, and amid the thunders of a new Sinai a new dispensation is proclaimed.

This pontifical pronouncement has been, and is now, a source of grave inconvenience to the State under other skies; but from the advocate's point of view, it was a signal triumph. His status was raised immeasurably. That consummation was a striking tribute to the age-long propaganda of the Inns of Court—that is the advocate in his corporate<sup>1</sup> capacity.

Unhasting, unresting, the Inns have laboured in and out of season for the glorification of the

<sup>1</sup> For their own purposes, special pleaders have held that 'An Inn is no corporate body but a voluntary Society. There is no one in an Inn to whom a writ can be directed.' This is one of our Byzantinisms.

advocate. They seized every opportunity of magnifying his office. They secured, defended and extended his privileges and prerogatives. The wealth of the Inns is considerable. Their organization is admirable; they are to the legal profession what the General Staff is to the German army. The intellectual resources of the Inns are immense; their rhetorical possibilities are illimitable. Their efforts directed through a long period to one end have been crowned with unexampled success.

The conditions that have secured the ascendancy of the legal profession throughout Anglo-Saxondom are of absorbing interest, not only as regards the past, but still more when we turn our eyes to the future. And if we extend a tribute of admiration to the greatest triumph of organization that our race can show, we shall moderate our transports if we look beneath the surface and consider the cost of this long tale of privileges to the nation; and not to this nation only but to the British Empire and the American Republic. For it must be understood that the influence of the Inns of Court extends far beyond the confines of these islands.

These Inns are essentially private and irresponsible trading enterprises—a species of Mercator's projection of the thirteenth into the twentieth century. Their first privileges—a modest instalment—were conferred upon them during the last decade of the thirteenth century. These were immunity from arrest while in attendance on the Courts and exemption from jury service. Suc-

ceeding centuries have piled privilege on privilege. In some cases these have ripened into monopoly. Two are highly significant. We refer to the monopoly of the right to plead. And, arising out of this—it having been decreed that barristers alone are eligible for the Bench—the monopoly of recruiting the judiciary. Both concessions are subject to slight exceptions which need not detain us at present, except to mention the fact that solicitors can appear before inferior Courts in trifling cases; and one-third of the Judges in India are not members of the Bar. As regards this country, the recruitment of the Bench is rigorously confined to the Bar.

There is no instance of two such concessions in the vital domain of law being enjoyed by a private enterprise. Sacerdotalism and Brahminism in their palmy days might be challenged to show such prerogatives. Consider for a moment how they have contributed to caste ascendancy.

• The Inns form a close corporation—in reality if not in name—with absolutely despotic powers. These depend on the fact that only continued membership of an Inn confers the right to plead. No other qualification whatsoever carries that right without such membership. It is difficult to exaggerate the significance of these disciplinary powers. The triumphs of the monopolist are the discomfiture of the public. Business monopolies are found to act in restraint of trade. Legal monopolies most assuredly act in restraint of Justice. Barristers' fees have been raised enormously during the last fifty years, and there is

still an upward tendency traceable directly to the policy of the Inns. They 'deal promptly,' says one authority, with a barrister who accepts fees under a certain scale, although he himself may consider a lower figure remunerative. He is not a free agent to make his own terms like the physician. Thus prohibitive tolls tend to block the avenues to Justice and we begin to apprehend the price which has been paid for the success of the Inns of Court.

In their case, too, as in the history of all monopolies, the charmed circle of the beneficiaries of privilege tends to become more and more restricted. The public welfare is sacrificed to a caste by continually raising a tariff wall round Justice. Then the caste is immolated, in its turn, to an oligarchy—the senior Bar. In their interest fees are constantly raised. In their interest the Long Vacation is defended. The public is assured that ours is the best of all legal systems. Shall the junior Bar be permitted to doubt that poverty is the best of all tonics ?

The disciplinary powers possessed by the Inns are not less anti-national when used to repress the invaluable impulse of youth to innovation. The unprogressive character of our legal system is due to this incubus. The Inns prefer the stillness of the swamp to the flow of the tide. They oppose the inauguration of a School of Law, while we shall find that the legal instruction they provide is condemned as inadequate by foreign critics, who declare our lawyers incapable of rising to the comprehension of wide generalizations in law.

This hidebound empiricism of our lawyers, while offering the most vivid contrast to the wide horizons of our scientific investigators, has reacted most unfavourably upon our politics at some of the most critical periods of our history. It is unfortunate that lawyers have played such an important part in our councils. Rarely can it be claimed for them with justice that they have been empire builders. In Lord Morley's 'Edmund Burke' we read that 'the vicious spirit of adherence to the very letter of legal or quasi-constitutional rights had ever marked the whole policy of England towards her American dependencies.' There is the trail of our pedantic enslavement to the letter. Writing of the same period, Sabine says :

The commercial code was so stern and cruel, that an American merchant was compelled to evade a law of the realm in order to give a sick neighbour an orange or a cordial of European origin. . . . An American shipowner or shipmaster when wrecked on the coast of Ireland, was not allowed to unload his cargo on the shore where the vessel was stranded, but was required to send his merchandise to England when, if destined for Ireland or wanted by the Irish market, an English vessel might carry it thither.

Ignorance in high places, a narrow, insular commercialism barbed and envenomed by subtleties woven by our legal draughtsmen and Law Officers of the Crown, lost us the American Colonies. In describing some of the blunders committed by this country in the estrangement of the colonists, Mr. Low in 'The American People'

uses the expression 'precedent-loving England.' That characteristic arises from the predominance of lawyers on our councils. Lawyers drag their professional bias for cases rather than principles into politics. Who can doubt that if the Fates had decreed that we should be governed by scientific men rather than by lawyers, many terrible blunders might have been spared us.

Much as the American Colonies suffered from harassing refinements of English law before their independence, it was a bagatelle to what they have suffered since. American lawyers are never tired of proclaiming the solidarity of their legal system with ours. We shall find, too, that they acknowledge a debt of gratitude to our Inns of Court. And with reason: because the Bar in the United States, as with us, produces the Bench. We shall show that a barrister-Bench following and exaggerating our traditions of slavish respect for the letter combined with the abuse of the jury system have contributed materially to render the United States the most lawless country in the world.

Fifty years later than the date of the events to which the authorities cited refer, that is to say in 1810,<sup>1</sup> we find the House of Commons applauding an ordinance which decreed the raising of the scale of Court fees in our Indian Empire. It is impossible to avoid the suspicion that this movement was instigated by the Inns of Court.

<sup>1</sup> 'A century ago it was perfectly well known that whoever had one audience of a Master in Chancery was made to pay for three.'—*Lord Acton's 'History of Freedom,'* p. 3 (London, 1907).

It is perfectly consistent with their home policy. We shall show that India, like America, is suffering grievously from Legalism of which the Inns of Court are the citadel. Nor is there occasion for surprise in this circumstance. The main object of monopolists must ever be to maintain and enhance their privileges. It is idle to blame them. The blame attaches rather to those who conferred and those who perpetuate privileges, for which there is no place in a well-ordered State. It seems incredible that this nation tolerates intermediaries in the vital domain of the administration of Justice. Their real interests centre not in Justice, which cannot be an article of sale, but in Legalism, that counterfeit of Justice which can be made to cost any price put upon it by the monopolist purveyor.

What venality is in some countries, that Legalism is in Anglo-Saxondom. Using forms of Law which should be the vesture of Justice, Legalism perverts them from their purpose. The multifarious resources of chicane are the strategy of Legalism ; its tactics are sophistries, subtleties, hair-splitting refinements—in a word, strict constructionism, the worship of the letter, whose unfailing concomitant is disregard of the spirit.

Here we observe the striking family resemblance between Legalism and Clericalism. They are closely allied. Both are examples of the degeneracy of the spirit into the technical formalism of the letter. And as the theologians have sometimes been the worst enemies of religion, so we shall find that legalists are the worst enemies

of Justice. Both Legalism and Clericalism have a microscopic eye for rigid correctitude of form. The casuists of one cult held interminable discussions on the number of angels that could dance on the point of a needle; while the devotees of the other have continued the angels' exercise on fine points of law even unto this day.

It is one of the ironies of history that a race which boasts that it was among the first to shake itself free from the fetters of Clericalism should still hug the chains of its congener. Although the latter are less obtrusive, they are not less harmful to the national life. Like Clericalism, Legalism denies the right of private judgment to the laity. 'No one knows what the law is until a case has been tried in Court.' Tribute must be paid to the Bar. There must be a sacrifice; there must be a victim. Like Clericalism, Legalism grants indulgences; under the mask of 'sacred duty' to clients, the wildest extravagance of advocacy have come to be accepted as part of the order of nature. Like Clericalism, Legalism has a large number of infallible popes—nor is it satisfied with one at a time—these are the Judges of the past. Respect for their decisions, even when perfectly absurd, is our form of ancestor-worship. It is the most striking example now extant of the tyranny of the dead hand. Like Clericalism, Legalism has an Ecumenical Council. This is the jury. Its findings, no matter how irrational they be, are considered sacrosanct. Like Clericalism, Legalism strenuously opposed translations into the vernacular of what it behoves the laity to



have cognizance. Beaten as regards the statutes, Legalism made a last stand in demanding that decisions at least should not suffer a like profanation. Our rude forefathers resented this obscurantism, and on two occasions, in the fourteenth and fifteenth centuries respectively, they made eruption into the Temple and threatened it with destruction and its denizens with massacre.

Unlike Clericalism, which can neither learn nor forget, Legalism has altered its tone without changing its policy. Its gossellers strike the modern note. They outdo each other in extravagant professions of zeal for the public welfare. These protestations were loudest during the worst periods of our legal history. Nowhere does special pleading venture on such giddy flights as in Anglo-Saxondom. It resists the most urgent reforms in the name of public interest.

This is an extract from the protest of the Bar Council against the County Courts Bill in 1910 :

There can be no doubt that in providing for extended local administration of Justice through the medium of the County Courts one of the first results will be to break up the profession into fragments and reduce its efficiency in the service of the public.

Applying the usual standard of interpretation to the efforts of the special pleader, we read this as a protest against the diminished efficiency of the public in the service of the Bar.

We are not endeavouring to saddle contemporaries with responsibility for a policy on which abiding characteristics were imprinted centuries

ago.<sup>1</sup> At the same time it is of supreme importance for our future to realize the fact that in the vital province of Law we have a series of bridle-paths encumbered with tolls and beset with pitfalls; while our neighbours and rivals have a highway so perfectly planned that the wayfaring man, though a fool, can hardly err in it.

<sup>1</sup> The Inns belong to the Dark Ages rather than to the world of to-day, so their claim to a modified extra-territoriality is appropriate and consistent. We read in the daily Press: 'The refusal of the authorities of the Temples to recognize the jurisdiction of Dr. Waldo, J.P., as the coroner for fire inquests is likely to have far-reaching results. The whole question of the rights claimed by the authorities of the Temples is to be raised at the Guildhall in the interests of the ratepayers. At present the Temples are their own assessment authorities and pay rates merely on the amount at which they value their own property. The Temples say they are extra-parochial.'

For the income of the Inns, Dr. Gerland's criticism of the instruction provided for legal students, etc., etc., see Appendix B.

## CHAPTER III

### THE SOLICITOR

'Solicitors have probably as much power in connection with Law reform as anybody.' I put their influence far above that of members of the House of Commons.—*Lord Chief Justice Alverstone.*

'The most strenuous opposition has been offered by the majority of the legal profession, principally supported by the Incorporated Law Society.'—*Lord Chancellor Loreburn.*

ONE of these pronouncements was made to an audience of solicitors; the other to the House of Lords. Taken together they are little calculated to bring comfort to the man in the street. Yet we refuse to be discouraged. There are novel features in the world of Legalism. Where harmony reigned there is discord. Instead of the ideally perfect condition of the old Chancery days, when the solemn bass of the Judge, the sounding brass of the barrister, and the tinkling cymbal of the attorney made sweet music, a jarring note is occasionally heard. Outspoken criticism is taking the place of mutual admiration. This is a healthy symptom.

A recent Lord Chancellor<sup>2</sup> enjoys the unique distinction of having drawn a heavy fire from two of the three branches of our Brahminism.

<sup>1</sup> 'It is but solicitors' law,' says Sir M. E. Grant-Duff, 'alas! that our law-abiding country mainly doth abide.' And with a twinkle so said Westbury.

<sup>2</sup> Lord Loreburn.

*Eppur si muove.* The Time-Spirit will not be denied.

Speaking of the Bar, the Lord Chancellor said: 'This discussion shows one how lawyers are against legal reform. It is an interested professional opposition and I feel it my duty to say so.' Scarcely less noteworthy is a speech at a recent Conference of the Law Society on the need for an Imperial School of Law. In this speech the following passage occurs:

It can hardly be denied by the thoughtful observer that the desire for a great Imperial School of Law was widespread; and even the Inns of Court could not maintain for ever their attitude of passive resistance to reform.

These incidents are reminiscent of Marryat's triangular fight. It is a fine quarrel as it stands. We have had peace at a huge price too long. Only complete stagnation within the profession and public apathy without can account for the medievalism which reigns not only in essentials but in externals—in phraseology for example, with which the solicitor branch is more intimately concerned.

Is it possible to imagine any jargon more barbarous than our legal phraseology? We do not refer to such horrors as *femme sole*, *femme couvert*, *cestui qui trust*; we leave Norman French to the tender mercies of the Law; but we do protest against the outrage put upon our mother tongue in legal documents. The gibberish is part of a deliberate plan for increasing fees by

spreading over a dozen sheets of parchment what might be clearly expressed on a single sheet of foolscap.

‘Tout ça pourque, dans cinquante ans,  
Exploitant ces phrases cassantes,  
Du notaire les petits enfants  
Aient aussi leurs petites rentes.’

That pessimistic forecast may be realized in England; it is already falsified in France. Our neighbours have agitated for reform and they are assured of success. Notaries and avoués support the movement. Over eighty-one per cent. of them approve of bringing legal phraseology into line with ordinary language. Is as much as a whisper heard of a similar movement in this country? The suggestion is absurd. As recently as the year 1910 the leading journal had occasion to admonish the reactionary majority of solicitors for successfully resisting a motion making it compulsory to keep clients’ moneys in a separate account. We must possess our souls in patience and stimulate the phagocytes—the reforming minority.

When we pass on to the weightier matters of the solicitor’s duty—such as the drafting and attestation of Wills—we shall have occasion to experience surprise at the apathy of the Bench. A case of recent occurrence will show cause for a departure from this Oriental passivity on the part of those who sit in judgment.

A Will was drawn up by an eminent firm of solicitors and brought to the residence of the

testatrix for signature. It was duly signed, and then the solicitor, a partner in the firm, requested the husband of one of the principal beneficiaries to witness the signature. His compliance invalidated his wife's interest under the Will and she has suffered a grievous loss without possibility of redress.

Such cases have occurred a great many times. The solicitor is protected. Judge-made Legalism holds that there is no contract with the beneficiary. An action would lie if the departed would revisit the glimpses of the moon ; not otherwise. Even then it might be found that the solicitor was a man of straw. When we consider how wide a door this condition of things opens to fraud, we are astounded at the failure of the Bench to recommend the simple remedy adopted by our neighbours. This is the Family Council—a beneficent contrivance of Roman Law.

The Council meets under the Presidentship of the ' Juge de paix.' When there is no allegation of fraud—as in the case cited above—it is agreed by a majority of votes that the wishes of the departed shall be carried out notwithstanding a technical informality. The avoué is admonished. The law is explicit<sup>1</sup> as regards his liability for errors of form. This decision has the force of law. A small fee is paid and there is an end of the matter. This is Justice. Under Legalism—where louder

<sup>1</sup> According to Belèze : ' If a client has suffered loss through the act of a notary : if, for example, he has made a blunder in a document which makes it null and void, an action for damage can be taken against him.' The security demanded of notaries in Paris is 50,000 francs.

lip-service is rendered to Justice than anywhere else in the world—the unfortunate layman, although innocent as the babe unborn, must expiate the outrage done to the letter by an Officer of the Court! These be thy gods, John Bull! They hold thee still in Egyptian bondage.

It is true that we have Brother Jonathan to keep us in countenance. All over Anglo-Saxondom a very large amount of conscience-keeping is done by solicitors. This duty fell to the priest under Clericalism. It is now taken over by his successor. Purblind confidence in the solicitor has contributed enormously to the aggrandisement of the legal profession and, in an increasing number of cases, to the ruin of the client.<sup>1</sup> In any matter

<sup>1</sup> In the *Anomalies of English Law*, the author, a barrister of the Middle Temple, says: 'The present writer holds no brief to attack the profession of solicitor: quite the contrary. But he is compelled to admit that he has found many solicitors guilty of "dirty tricks" (for which there are no punishments) towards their clients. "Dirty tricks," a vulgar and exactly expressive phrase, may be said to represent those acts in which a man of honour or even ordinary decency could not indulge.

'To cite some actual examples:

'Deceitfully obtaining a signature charging certain property with an exaggerated bill of costs on a tacit understanding that a loan is to be the result.

'Getting possession of papers under a false pretext, where the circumstances are such that no remedy exists in law for their recovery.

'Disclaiming a telephone message because its despatch cannot be established in a subsequent action.

'Denying receipt of a client's funds until threatened with the police.

'These and dozens of other somewhat similar occurrences come to mind with clearness. Petty conceit and meanness are qualities which are to be found in a flourishing state in many solicitors' offices . . .

'The solicitor's own knowledge is frequently little above that of a mature office-boy, though he generally manages to apply it to his own personal profit, at any rate. One does not tar all solicitors with the

outside the common routine, the assistance of another lawyer is invoked ; and not infrequently a third pundit is called in. There is much correspondence, many interviews, a hunt through the centuries for relevant cases. The other side is going through a similar performance. They maintain that quite as many cases favour their contention. It is a mere toss-up. Legalism has degraded Law into a sheer gamble. In a large number of cases the unfortunate litigant finds that the soundest cause may be lost on a verbal quibble. He pays from four to eight times for Legalism what his neighbours pay for Justice. It passes all understanding why we do not send a Commission, with a majority of laymen, to ascertain by what process our neighbours have secured cheap Justice. The influence of the reactionary majority of solicitors and barristers explains our inaction. Truth to tell, it is hardly worth the expense of a trip across Channel or North Sea to learn the word of the enigma. It is codification, abolition of juries in civil causes, specially-trained Judges not recruited from the Bar, and the merging<sup>1</sup> of the duties of solicitor

same brush ; still there is something in the profession of a solicitor which seems to produce certain generic failings. The bad name of the profession is not altogether unfounded : it is something more than a cheap superstition or tradition.'

<sup>1</sup> The same writer says (p. 201) : ' In bringing this chapter to a close, it seems only fitting to lay stress again on the desirability of entitling a barrister to receive a client without the obligatory intervention of a third person, namely, a solicitor. An absurd anomaly, the legal assumption that every man knows, or is expected to know the law, would perhaps be somewhat nearer fulfilment if counsel were less unapproachable than they are to-day.'



and barrister. But our devotion to the cult of advocacy is proof against all attempts at root-and-branch reform.

But not even our submission to the advocate, whose broad *agis* affords solicitors a certain amount of protection, can prevent one superstition from being gradually exploded—we mean the impression that lawyers are necessarily good business-men. On purely *a priori* grounds we should be disposed to challenge the correctness of the tradition. The attempt to manage any business, as the legal business of this country is conducted, would mean filling the pockets of the officials of the company and the absolute ruin of the shareholders; and that too without casting suspicion on the uprightness or honour of those officials. If they all acted on the go-as-you-please principle: if there were no effective control over them: if the management were a mere *simulacrum* like our imitation of a department of Justice, swift ruin would overtake the enterprise.

To turn to a concrete case, that is the brief history of the Law Guarantee, Trust, and Accident Society. It was registered in 1888 as the Law Guarantee and Trust Society. In July the name was changed as above. The authorized capital was £2,500,000. According to Sir Edward Carson, K.C., M.P., as reported in the *Financial Times* of Thursday, April 27, 1911, 'The Directors were nearly all solicitors of eminence and had great experience in the kind of business which the Society carried on.'

One may well wonder whether the upshot could

possibly be worse had those eminent solicitors been absolutely without any experience whatsoever. The Society is in liquidation. On this subject the City editor of the *Observer*, writing on the last Sunday of the year 1911, has the following criticism :

The Lord Chief Justice—who was misled and signed a letter urging voluntary liquidation which caused the shareholders to say voluntary liquidation it should be, and thus they became hopelessly side-tracked now that they want an inquiry—says, in his private capacity, clearly that he was misled, has altered his mind, and thinks public investigation necessary. . . . Do not let there be any mistake about it. Full investigation there must be. If Mr. Asquith and other leaders of the legal profession do not realize the eternal disgrace of avoiding an inquiry, the while unpleasant things are being said of the professions concerned, it is time they acquainted themselves with the full measure of the scandal.

There is not the slightest occasion to create an atmosphere of gloom or suspicion around this subject. It is as clear as day that a body of learned, upright and honourable men paying themselves high salaries, and running the business of a Society on precisely similar lines to our legal business, could lose two or twenty millions without the least difficulty. Legalism is as thoroughly bankrupt in credit as the Law Guarantee, Trust, and Accident Society. But John Bull has not yet apprehended the fact. He continues to pay, and so the evil day is postponed. It is quite conceivable that he will continue to pay until

the Empire itself is the price of our devotion to the cult of advocacy.

• And yet the lawyer is not loved in England. Toleration there is, but not popularity. Anyone who mixes freely with his fellow men is aware of this. A score of familiar phrases in the popular speech, in proverbs, in rhymes, are a singular commentary on the manufactured and mechanical applause which punctuates a reference by our Manhus to the supreme excellence of the product they purvey. Scepticism will one day be focussed into action and John Bull, tired of inaction and turning aside for a time from politics and football to look at his neighbours' backs in the rivalry of races, will finally gird up his loins and put away from him a long-standing reproach: '*Pauvre animal! La Nature t'a fait sanglier, mais la civilisation t'a réduit à l'état de cochon-de-lait pour les délices des gens de robe.*'

NOTE.- Speaking in the House of Lords on July 19, 1911, the Lord Chancellor said: 'The present condition of the Law in England as regards the title to landed property and the methods of transferring it, except where there exists registration of title as in the County of London, was little short of a scandal. It was almost unique in its futility and costliness. . . . It has been estimated by a very high authority that apart from all stamps, duties, and Government charges, the solicitors' costs and charges out of pocket for those transfers of landed property amounted to £4,000,000 a year, whereas the Government stamps on dealings in land amounted to only £1,000,000. He believed that this cost on the part of the solicitors was within the mark.'

For many interesting and some amusing excerpts relevant to this chapter, see Appendix C.

## CHAPTER IV

### THE JURY

‘He thought that public opinion had been shocked by some of the verdicts that had been given recently in libel actions.’—*Mr. Justice Scrutton.*

WE may assure the learned Judge, with great respect, that his surmise is incorrect: the public has long lost the capacity for being shocked at anything a jury does. But the public does still experience a mild feeling of surprise, not amounting to shock, at the Oriental passivity with which ninety-nine Judges out of a hundred receive the verdicts of juries. There is a tacit assumption on the part of the Bench that a high degree of sanctity attaches to the finding of a jury, even when it is manifestly absurd and dead against the evidence.

In most cases it is perfectly clear that these verdicts have been secured by the arts and artifices of advocacy.<sup>1</sup> The worse has been made to appear

<sup>1</sup> At the Royal Commission on Divorce, as reported in the *Observer* of February 27, 1910, Mr. Justice Bargaive Deane, in answer to Lord Guthrie, said: ‘He thought greater justice was done by Judges than by juries. When he was at the Bar and was asked whether they should have a case tried by jury, or not, he always considered the nature of the case. If he had a thoroughly good case, he would try by a Judge: if it was a very doubtful case he would advise that the trial should be by jury.’ (Laughter.)

the better reason. Plausible fallacies, confident rhetoric, a great reputation, an insistent personality have carried the jury off their feet and extended to a piece of glaring injustice the consecration of legal forms. Public acquiescence in such travesties would mean the entire supersession of Law which is the vesture of Justice, by Legalism which is its counterfeit. That this is a danger which besets us as a race there is no denying. It is the defect of our predominant quality. We have been extremely law-abiding from all time. But it is a hopeful sign that our patience with certain vagaries of Legalism by no means reaches the point of acquiescence.

When a litigant has lost a sound case and is being consoled by his solicitor with an assurance that, notwithstanding slight defects, ours is the best of all legal systems, he has been known to retort, 'I wonder what the worst is like!'

Another circumstance of great significance is the diminution in the suits in which really important issues are involved, and the marked increase of libel actions. These are two of the clearest possible indications that the jury system

\*Before the same Commission, Sir John Bigham, in answer to Lord Guthrie, who asked, 'What is your view of the English system of taking a considerable number of cases with juries and the Scotch system of taking them before a Judge?' The answer was, 'I infinitely prefer the Scotch system. I think more injustice is done by juries than people know.'

'Your view, then, is that these are the typical cases which should not be before juries?'

'Yes; the feelings of juries are influenced by all sorts of considerations which, in the opinion of a lawyer, should not influence them at all.'—*The Times*, March 1, 1910.

is being found out. Serious differences are being settled out of Court ; and juries are being appealed to, more and more, by people whose characters are sadly in need of repair ; by gamblers in damages, who have little faith in the soundness of their case, but put their money on the chance of the actor-advocate's commanding influence with the jury. The jury system, in a word, has become a favourite medium of speculation.

The tenderness, not to say reverence, of our Bench for the institution of trial by jury affords an interesting contrast with the policy of our continental neighbours. They tried trial by jury and found it wanting in respect of every single claim that had been advanced on its behalf. It was soon looked upon as an intolerable abuse owing to the grievous uncertainty<sup>1</sup> of its results and the consequent expense of appeals and fresh trials. There was a sigh of relief when statesmen and jurists agreed that its abolition in civil actions should be decreed. Even in criminal cases there is profound mistrust of its working, so that its final and complete abolition is merely a question of time.

It is a noteworthy fact that the Scotch entered

<sup>1</sup> We read in the public Press of July 13, 1910, that 'The jury disagreed for the third time in the case of William Moore, who was tried at the Omagh Assizes yesterday for the murder of William and Mary Holt at High Cross in July last. Over fifty witnesses were heard on behalf of the Crown and the trial lasted two days and a half. The prisoner was once more put back in the cells. The victims of the murder were two old-age pensioners who lived in a thatched cottage at High Cross, and Mr. Justice Gibbons described it as the worst murder case he had ever tried.'

a strong protest at the Union of Parliaments against juries in civil actions ; but their opposition was overborne by English lawyers.

How comes it, then, that an institution which was abolished by our continental neighbours, and condemned by our fellow-subjects in Scotland, is acclaimed by English lawyers as the palladium of our liberties ?

Even Mr. Justice Scrutton, who assumes the exceptional rôle of critic rather than champion, is very far from recommending drastic remedies. He is content to give expression to the pious aspiration ' that juries may yet be got to appreciate adequately the importance of what they are doing.'

The aloofness of the sequestered gods of Lucretius is an occasional affectation of our Judges. What likelihood is there of the common run of jurymen following this counsel of perfection ?

It must be borne in mind that large sections of the most intelligent classes are exempt from jury service. Those on whom it devolves leave desk or counter regretfully. They can ill spare the time although willing to do their duty. The recurring thought of business neglected is an ill preparation for the exercise of the judicial faculty—for that is what Justice demands of them. The juror's natural impatience increases as the proceedings are prolonged from day to day. A procession of witnesses passes before him, but he is unaccustomed to weigh evidence. What one advocate lauds to the skies, another denounces in scathing terms. Torn by conflicting emotions, the jurymen is not in a condition to distinguish

between matters of fact and questions of law when the summing-up is finally reached.

Whatever guidance the Judge supplies is neutralized by a sea-lawyer in the form of a hectoring, bullying, masterful colleague into whose clutches the unfortunate jurymen falls on retiring. Tired, over-persuaded, impatient, he agrees to something about which he is only half convinced.

Does any honest suitor hesitate for a moment in preferring to have his case adjudicated upon by a Bench of Judges—that is the continental substitute, not a single Judge—rather than by a Judge and jury? We trow not.

Well we know, and contemporary reports prove to demonstration, that juries offer the attraction of a gamble to the worst cases backed by the 'Subtle Arts of Great Advocates.' The jury system is the mainstay of the unjust suitor.

It is a significant fact that only in Anglo-Saxondom does the fetish-worship of the jury obtain. That circumstance supplies the explanation of another puzzle—the ascendancy of the English Bar. Exclusively recruited from the Bar, the Bench is one with it in origin, tradition, training, sentiment and sympathy. Success with juries being the passport for promotion to the Bench, or to high office in the legal hierarchy, we understand the kindly feeling for the jury system entertained not only by Judges but by all successful lawyers. Advocates are the spoilt children of the State. Juries are the special pets of advocates. The jury system is the palladium of the Bar. Its vested interest, its special pleading have



contrived to cast a glamour of pseudo-sanctity around farcical verdicts. The Judge knows they will be reversed on appeal. Precisely. Appeals and fresh trials bring grist to the Bar. That is the vicious circle of Legalism. Our continental neighbours have found and applied the remedy; but that is another story.

For an account of the origin of the jury system, the recent action of Rhodesia and Natal, and other information, see Appendix D.

For an account of some of the artifices for verdict-snatching used in the United States, and recommended in *The Subtle Arts of Great Advocates*, see Appendix G, and chapter headed 'Bench and Bar in the United States.'

## CHAPTER V

### DEAR LEGALISM

‘To no man will we sell, or deny, or delay Right or Justice.’—  
*Magna Charta, June 25, 1215.*

‘Magna Charta notwithstanding, we sell Justice and not cheaply.’—  
*The Times, September 22, 1911.*

**N**APOLEON called us a nation of shopkeepers, meaning it as a reproach. It is really a compliment. All nations are keen traders now: and Pig Iron should not despise Tenpenny Nail. Napoleon did us more than justice: we are fraudulent traders. We do our best to degrade a supreme quality into a vulgar commodity. Failing in the attempt, we palm off a spurious article on the public.

With all respect to the oracles—ancient and modern—which we have cited, Justice cannot be sold. Its quality is strained the moment a price prohibitive to the poorest is put upon it. The accessibility of Justice exalts a nation: the inaccessibility of Legalism exalts a caste. Justice resembles love in being priceless and in having many counterfeits which are subject to the haggling of the market. They are colourable imitations that sometimes deceive the very elect.

There is no denying the charge that we are vendors of spurious wares which Justice repudiates.

These fetch exorbitant prices and they are sold under false labels. 'The Law's delay' equally with the Law's expense is a denial of Justice ; and by denying Justice we give potent encouragement to injustice. This is not an over-statement. A century ago to a year the House of Commons applauded a measure framed to check litigation. It raised Court fees all round--a record in human folly. Possibly a different description is applicable ; lawyers outnumber all other professions in the House. Barristers raised their fees immediately. This disastrous remedy was administered to India. Being an incomparably poorer country than this, the mischief wrought was proportionately graver. The reason is easily seen.

Suppose the Courts are closed to litigants who fail to turn the scale at fourteen stone. That simple test would diminish litigation enormously. If it seems an insane method of reaching a desirable end, we ask whether it is one whit less irrational to impose a high pecuniary qualification with the same object ? Obviously the weight of a litigant's purse is no better guarantee of the soundness of his cause than the weight of his person. But there is more in this than is seen at the first glance. The pecuniary test is not only as irrational as the other, it is far more mischievous. The most rapacious Shylock of them all cannot deprive his victim of tissue in order to exclude him from Justice and at the same time raise his own weight to qualifying point. But that is precisely what the unjust man does under the other test, because the contents of the purse are easily transferable.

Suspecting that his intended victim is in straitened circumstances, the oppressor withholds money, procures delays, effectually barring the passage to redress by calculated spoliation.

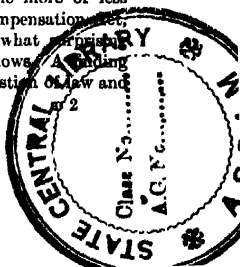
Notwithstanding Magna Charta, we callously refuse protection of Law to that section of the community which stands most in need of it. Legalism is the charter of the unscrupulous rich : the despair of the honest poor. We treat the pauper more favourably. We are generous before we are just.

It is singularly unfortunate that popular prejudice has been manœuvred to the support of private monopoly. ' Cheap and nasty ' is a proverb we never allow to grow musty. We have the Legalism our snobbishness deserves ; but is no guidance to be expected from the Government ? Our weights and measures are scrupulously verified. Our railway and telegraph rates are carefully controlled ; railway and cable companies know to their cost that the Government exerts considerable pressure upon them for the reduction of rates, while permission to raise them is seldom or never accorded. Contrast this laudable solicitude for the public welfare with the complete dereliction of duty in the province of Law. And yet therein are found the forces which possess the most penetrating, far-reaching influences among all human activities for good or evil, for regeneration or demoralization. We shall find both processes at work among our contemporaries, offering us example and warning so plainly that he who runs may read. But while a series of queries suggest

themselves, why are we denied the boon of codification? Why do we retain that fertile source of uncertainty and expense—the jury system in civil causes? We are arrested on the threshold of our inquiry by the words of the Lord Chancellor cited in a previous chapter. Even in respect to such an obvious reform as the registration of title to landed property, he finds it extremely difficult to make headway against the interested opposition of the legal profession. We may take it, then, on the evidence of the Lord Chancellor that we are in a parlous condition. And the question naturally arises, whether those who have grasped the full significance of the situation should rest satisfied with an occasional warning delivered in the House of Lords. It cannot be admitted for one moment that membership of the Bar discharges members of the Government from their responsibility in this matter. On the contrary, the extraordinary predominance of lawyers in the present Ministry is a circumstance of the utmost gravity; and, having regard to the Lord Chancellor's opinion, it is the most convincing argument for a vigorous effort of the reforming minority of the legal profession in favour of a national, as opposed to a caste programme.

The simple truth is that if the popular phrase about the law being made by and for lawyers<sup>1</sup> is

<sup>1</sup> In a leading article on 'The Conflict of Courts,' *The Times* of July 20, 1910, says: 'Our Courts continue to wrestle more or less successfully with the meaning of the Workmen's Compensation Act, and to extract from apparently simple words somewhat surprising results. The typical course of proceeding is as follows: A finding by the County Court Judge as to a certain mixed question of law and



not strictly accurate, the practical result is precisely the same. The fact can no longer be denied. We have a State within the State. We suffer from the ascendancy of a caste which has entrenched itself in the legal domain, whereas the first condition of a well-ordered State is harmony between opposing forces. After defence from external aggression cheap Justice is the chief interest of the public. Instead of cheap Justice we have dear Legalism.

Here our neighbours and rivals put us to open shame. It is the object of their unwearying solicitude to bring Law and Justice into close harmony. Their guiding principle is that where there is not cheap Justice, there is no Justice. That axiom was first enunciated in this country, but it has fallen on deaf ears, notwithstanding Magna Charta. Our neighbours have taken it to heart and, with admirable singleness of purpose, they strive unceasingly to make Justice the heirloom of all, like water and sunshine.

If that high ideal can never be definitely attained, it is the noblest characteristic of a State to have made sincere and well-directed efforts in that direction. A large measure of success has been achieved. The jury system has been abolished

fact ; prompt reversal by the Court of Appeal, or, at all events, disagreement between its members, followed by reversal by the House of Lords or disagreement among the Law Lords. . . . Was this an accident arising out of, and in the course of, his employment ? The County Court Judge said "Yes." Two of the Judges of the Court of Appeal said "No." Three of the Law Lords said "Yes," and two "No." . . . It is not clear where the Courts can or will henceforth consistently stop.' For a longer extract from this article see Appendix E.

in civil causes. A concise and comprehensive scheme of codification dispenses with the necessity for perpetual reference to a confused tangle of cases, another fertile source of expense and uncertainty. The duties of solicitor and barrister are merged in one individual. Expensive references to counsel are practically unknown. There is no irresponsible body of monopolists providing barristers and constantly raising their fees. The minimum Court fee is twopence-halfpenny. A sliding scale<sup>1</sup> is adjusted so that the percentage diminishes as the amount in dispute increases. A case involving the sum of £15,000 can be tried for an expenditure of no more than £78 in Court fees.

Taxed costs are fixed on an extremely moderate scale. The solicitor-advocate is free to bargain with his client: but no one will pay fancy fees when there is no jury, and histrionic efforts would assuredly defeat their purpose.

Our neighbours have proved to demonstration that the uncertainty—not the cheapness—of law encourages litigation. Hence the insensate folly of the remedy for the ravages of litigation in India.

Notwithstanding Magna Charta and the experience of our neighbours, we continue to listen to the siren song of the Bar. Codification, the great cheapener of law, is opposed on the following ground:

The Common Law of England is not a compendium of mechanical rules written in fixed and indelible characters,

<sup>1</sup> See Appendix E.

but a living organism which has grown and moved in response to the larger and fuller development of the nation. The Common Law of England has been, still is, and will continue to be both here and wherever English communities are found, at once the organ and safeguard of English Justice and English freedom.

This egregious fustian was applauded to the echo at the Bar dinner a few years ago. We know that codification is the safeguard of the people's pockets. The Common Law empties them to a high-falutin' accompaniment of turgid rhetoric about Justice and freedom. A slight acquaintance with special pleadings supplies the standard of interpretation for this pronouncement. Its true inwardness is that the Common Law is the most cherished possession of the Bar and the greatest possible infliction on the public whenever they have recourse to litigation.

We may judge of the high esteem in which the Common Law is held in the Daughter States by the fact that New Zealand has repudiated an abuse of it, which permits a parent to disinherit his legitimate issue. To her honour New Zealand has reverted to the humane provision of Roman Law, which obtains on the Continent and even in Scotland. The Common Law safeguards the interest of the widow and the orphan very much as the wicked uncle safeguarded the babes in the wood.

Lip-service in Legalism, as in Clericalism, covers a multitude of sins ; for centuries past we have been treated to a lavish application of this *eau bénite de la cour*, the vapid flattery of the special



pleader directed invariably to bolster up those portions of our legal system which are the most outrageous, the most expensive and the most uncertain. While our neighbours have been up and doing, we have been rocked into the sleeping sickness of Legalism. The benefits of cheap<sup>1</sup> Justice are denied us. There is no other tonic so wholesome, so energizing for the national life. To cheap Justice is mainly due the immense industrial expansion, the buoyant hopefulness, the commercial enterprise of the most efficient State in the world of to-day.

<sup>1</sup> The Press quotes a distinguished Labour Member of Parliament to the following effect: 'The great mass of the working classes of this country would be better off without the protection of the law.'—*Mr. Philip Snowden, M.P.*

For lengthy notes belonging to the subject of this chapter, see Appendix E. There are also tabular statements of the German scale of Court fees, the solicitor-advocate's fixed charges for taxed costs, bailiff's charges, etc. Attention is specially invited to an extract from an authoritative source about the increase in counsel's fees during recent years.

The following extracts are from a leading article in *The Times* of June 24, 1912. It is entitled 'Poor Suitors.'

'It is an old saying that our Courts of Justice are open to all comers, but only in the same sense as are the best taverns and hotels. The suitor as well as the traveller or guest must pay, it may be, much and often. At each stage or step in litigation the State takes toll; there are fees to be paid; and he must find at his own expense remuneration for counsel, solicitors and witnesses. Some Judges—for example, Lord Langdale—have condemned this system; justice ought, in their view, not to be thus sold; the State ought not to impose taxes on those who seek its aid. . . . The Agents for the poor, appointed under statutory powers, are a part of the Scottish system of procedure of which all concerned are justly proud. . . . From the latest report of the Edinburgh Legal Dispensary it appears that in 1910-11 and 1911-12, 1290 and 1180 clients were seen and received advice with the result, in a large number of cases, of an amicable settlement.'

## CHAPTER VI

### BENCH AND BAR IN ENGLAND

‘The intimate relations existing between Bench and Senior Bar in England ensure a very smooth and easy course of business. They dispose the barrister to fall in with the Judge’s suggestions ; while the Judge, on his side, is disinclined to see in the barrister an opponent, whom the call of duty may constrain him to admonish sharply. That the circumstance here set out makes, in the nature of things, only a pretence to typical, ideal Justice does not need to be specially insisted upon.’— *Professor Gerland of Jena in ‘Die englische Gerichtsverfassung.’*

AND so the theme of hundreds of after-dinner speeches, the chief glory of our juridical system, vanishes like a gibbering ghost at the coming of dawn ! A competent foreign critic, anticipating the verdict of history, incontinently shatters the legend. Our French neighbours are in absolute agreement with the Germans on this point. Their legislative enactments put it beyond doubt. The jurists and statesmen of these great communities—and not of these alone—have long since arrived at the assured conviction that the intimate relation of Bench and Bar, arising from a common training and a common atmosphere, do not subserve the ends of Justice.

On the other hand, our special pleaders maintain that Bench and Bar attain their highest possible pitch of efficiency ‘in the service of the public’ when friction between them has been reduced to

a minimum. '*Ça va comme sur des roulettes!*' One would imagine that the symbols of Justice were the roller-skate and ball bearings.

Putting fiction weavers aside, we shall find that the intimate association of Bench and Bar has been more calamitous than any other circumstance in our legal history. Bench and Bar became a confraternity of uncontrolled Legalists. Under this influence our system evinced no capacity for evolving general principles from empiricism. On the contrary, a process of deterioration set in. A Bar without salutary control or stimulus produced a Bench without principle or ability. Each reacted disastrously on the other. Laziness was followed by decadence. The next step was the harmony of complete demoralization described by Sir William Dugdale (1605–1681).

What [he asks] are the qualifications necessary for a gentleman who is a candidate for the Bar? Is he examined every term or vacation? No.

Are any instructions given him by the benchers or by their orders? No.

Is he obliged to produce evidence that he has read a single page of any law book? No.

Is it certain that he can write his name? Yes. Before he is permitted to dine in the hall he is obliged to execute a bond to pay the cook: and this is the only proof he is obliged to give of his learning.

But can a gentleman appear at Westminster immediately after the ceremony of being called to the Bar? Yes, on the day following: and he frequently begins his career by signing what are called pleas, sham pleas, calculated to deprive a creditor absolutely—always to postpone payment of a debt.

With such a Bar recruiting the Bench more and more, we shall not be astonished at the same chronicler's description of a Chief Justice 'of the period.

The reader will be surprised [he says] to hear that the Right Honourable the Chief Justice of the King's Bench, an Earl of Great Britain, and who, it is said, has amassed the enormous sum of £200,000 out of the tricks and glorious uncertainty of the law, should condescend to go snacks (the vulgarity of the expression is suited to the indignity of the subject) with the marshal and cryer in the distribution of the fee paid for writing the name of a cause in the marshal's list before the trial thereof. The money paid for writing four words is eleven shillings and eightpence, out of which his Lordship has six and eightpence : the marshal four shillings and the cryer one shilling : and this may happen to come out of the pocket of a poor man who is under the necessity of commencing a suit for the recovery of a just debt of, perhaps, no more than five pounds.

When invited to admire the brotherly relations of Bench and Bar —always in the service of the public —the unfortunate litigant must have felt that the harmony was of the description which receives its supreme illustration in the meeting of the upper and lower jaws of a wild beast. Nor were matters greatly improved when we come down to the first quarter of last century. The state of the law at that time is thus described by a recent authority :

The whole field was covered by a network of obscure, intricate, archaic technicalities, useless except for the purpose of piling up costs, procrastinating decisions, placing the simplest legal processes wholly beyond the

competence of any but trained experts, giving endless facilities for fraud and for the evasion and defeat of Justice turning a law case into a game in which chance and skill had often vastly greater influence than substantial merits.

The aggregate value of the estates in Chancery at one time is said to have exceeded £18,000,000. The process by which they were retained and worn down to nothing was not called by any of the harsh names applied to the exploits of *chevaliers d'industrie* in the purlieus of the City or to those of brigands in Calabria. The special pleader was equal to the occasion. The properties in Chancery were said to be 'milked.' The expression conjures up delightful associations. Imagine the bucolic simplicity of the scene! With the innocence of the milkmaid there is the suggestion of relief to the cow, otherwise efficiency in the service of the public, the great milch-cow of Legalism.

Did the Bench move a finger or raise a voice in protest against brazen robbery under forms of Law? On the contrary, Charles Dickens tells us that

a Chancery Judge once had the kindness to inform me as one of a company of some hundred and fifty men and women not labouring under any suspicion of lunacy, that the Court of Chancery, though the subject of much popular prejudice, was almost immaculate<sup>1</sup> There had been, he admitted, a trivial blemish or so in its rate of progress, but this was exceptional.

<sup>1</sup> 'He was confident that English law was nearly as perfect as it could be made.'--*Obituary Notice of Mr. Justice Grantham, The Times, December 1, 1911.* The passage continues '... though, by the way, he was in favour of the Criminal Code, then before Parliament, and protested strongly against the tactics which defeated it.'

The Nemesis of persistent deception is that its practitioners become self-deceivers. These are the megalomaniacs of Legalism. We suggest that charitable view of the Judge just mentioned. Large allowance must be made for the spoilt child of family or State. But that is not an argument for continuing the spoiling from generation to generation. If we pause for a moment to consider the condition of things existing so recently as three-quarters of a century ago,\* we shall stand aghast at the effrontery of those who undertake the championship of a system which left the public to be fleeced remorselessly, while Bench and Bar divided the spoils. Never were more fulsome compliments exchanged between Bench and Bar on all great occasions than during that period. The fact is a measure of the belief in the illimitable gullibility of the public entertained, quite justly, by the legal profession.

An unexpected result of this long record of unrestrained plunder is that when Judges' emoluments ceased to be drawn partly from fees, the scale of payment was fixed apparently on a basis of 'perquisites' *plus* salary. Hence the remuneration of our judiciary, which is considered amazing not only by continental, but also by American Judges. Those of the Supreme Court of the United States receive a maximum of £3,500 a year. The Lord Chancellor of England receives £10,000 a year, and, 'however short a time he may have held office,' his pension is £5,000 a year. Similarly the Lord Chancellor of Ireland receives a pension of £3,692 6s. 1d.

The following extract will enable us to understand the origin of these princely emoluments :

Extract from the Report on Law of the Special Committee of the House of Commons, 1810. 'Your Committee also proceeded to examine into all the fees and emoluments taken by the Lord High Chancellor in his jurisdiction as Chancellor as well as from commissions in Bankruptcy, and the evidence of Mr. Pensam distinctly shows the annual amounts of the emoluments for the last nine years, exclusive of those which arise to the Lord Chancellor as Speaker of the House of Lords. It will be found that from 14th April 1801 to 5th April 1802 the amount was . . . £9,926 12s. 7d., steadily rising until 1810 when the amount was . . . £15,532 13s. A considerable part of the emoluments of the Lord Chancellor is, as the Committee understand has been the case for a very long course of years, derived from fees nominally paid to the Secretary of bankrupts, but who accounts for such fees to the Lord Chancellor himself and is allowed by the Lord Chancellor a certain fixed salary, in lieu of such nominal fees. Your Committee cannot see this without observing that it appears to them highly inexpedient that the emoluments of any judicial officer should be constituted partly of fees not paid ostensibly to himself, but to an inferior officer. If more than the proper fees should be alleged to have been taken by the ministerial officer, the complaint must be made to his superior: the Judge of the Court would in such case have to sit in judgment upon such alleged abuses from which, if they existed, he would himself have derived a benefit. If it should be thought that any alteration should be made in this respect and if the salary and other emoluments of the Lord Chancellor should be deemed insufficient for the office, your Committee would suggest the propriety of increasing the salary and abolishing altogether the fees in question, which although they do not appear to be great in

amount in each commission. yet can be considered in no other light than as a tax on distress and insolvency.'

There is little doubt that the Lord Chancellor, in 1810, considered himself a deeply injured man who had fallen on evil days and reduced circumstances. His friends probably raised the cry of spoliation when his remuneration was reduced to £10,000 from £15,000 odd pounds *plus* salary. And so 'those portions and parcels of the dreadful past' commit us to this day to the payment of preposterous salaries which are tainted from their source. It will thus be seen that the ideals of the Bench and Bar were unutterably low for centuries together. Mere sense of shame—if such a sentiment were known to the special pleader—should deter him from trumpeting the harmony of Bench and Bar, considering the nefarious practices which it permitted.

Nor should it be forgotten that, although the outrageous excrescences of our system have been lopped off—not as the result of reform from within, but in response to popular clamour—the root of the evil crop is still with us. Recruiting the Bench from the Bar deprives the public of the protection against the super-subtleties, the sophistical refinements, the hair-splitting technicalities of the Bar. Are we expected to believe that such protection is as readily forthcoming from men who have but recently ceased to practise these artifices as it would be from those who not only never practised them, but have been trained in their detection and exposure?



Our legal history—the seamy<sup>1</sup> side of our island story—is a sufficient answer. Its lesson is that harmony between Law and Justice—the cardinal *desideratum* of a well-ordered State suffers grave prejudice by the intimate association of Bench and Bar when they are one and indivisible. This conclusion is re-enforced by the favourable experience of our neighbours, who have prescribed a course of training for the Judge distinct and separate from that of the advocate.

Anglo-Saxondom stands alone among all communities, ancient and modern, in denying the wisdom of this provision. It cannot be maintained that our history supports our contention. But as one instance may be deemed inconclusive, we shall now examine the case as illustrated in the experience of the United States and British India.

<sup>1</sup> In Sir Leslie Stephen's *English Utilitarians*, vol. 1, we read that 'Bentham gives statistics showing that in the year 1797, 543 out of the 550 writs of error were sham or simply vexatious contrivances for delay, and brought in a profit to the Chief Justice of over £1,400. Under Lord Eldon, he says equity has become an instrument of fraud and extortion. Bentham intimates that the Masters in Chancery were swindlers and that Eldon was knowingly their protector and the sharer of their profits. Eldon was but the head of a band. Judges, barristers, and solicitors were alike. The most hopeless of reforms would be to raise 'a thorough-paced English lawyer to the level of an average man.'

For further notes, see Appendix F

## CHAPTER VII

### BENCH AND BAR IN THE UNITED STATES

'The majority of the criminals in the United States <sup>as</sup> ~~escape~~ punishment.' *President Taft.*

THAT is a pathetic admission from the head of a State and a painful confession for an American lawyer. It may well be a subject of grave searchings of heart to English lawyers also. The English and American legal systems are based on the same lines.

It was the Bench and Bar of England [writes Mr. Choate, at one time United States Minister in London, and, needless to say, a lawyer] in the Inns of Court, in the Courts of Westminster Hall, and more lately in the Royal Courts of Justice, that established those absolute principles that lie at the foundation of our common liberties.

That is a grateful acknowledgment of a common origin. It is much more : it is internal evidence of a common tendency—that of mistaking the liberties of a caste for those of the public. We have just seen how Judges, barristers, and solicitors in the Royal Courts of Justice laid the foundation of their own fortunes <sup>1</sup> rather than of our liberties. As for the assertion that the Inns of Court ever

<sup>1</sup> See also Lord Campbell's *Lives of the Justices*, *passim*.

laid the foundation of any liberties except those which ~~their~~ members take with us, it is the highest flight of fiction. Cagliostro and Doctor Pangloss pant after it in vain. To invite the American layman to agree with the lawyer in a sentiment of gratitude to the Inns of Court is worthy of the comic actor-advocate. It is true that there are large numbers of people in America who have excellent reason for gratitude in escaping punishment.

What is the proximate cause for the condition deplored by President Tait? Is it, perchance, the inefficiency of the police or detective services? Not as a rule. The context makes it clear. The cause is the technicalities of the Courts. The President's distinguished predecessor inveighed repeatedly against the hair-splitting technicalities of the Courts during his term of office. 'These have made failures of Justice the rule rather than the exception. The result is that 'the murders in the United States last year bore, in comparison with those in the British Isles, a ratio of 116 to 6.' There is the outcome and natural development of a system which has assumed a malignant form under the stimulus of novel conditions. Just as measles, a trifling ailment with us, sometimes decimates a population in the South Sea Islands, similarly Legalism, which is indigenous with us, passes into its malignant form, Legalitis, in a favourable environment. That is found in the United States owing to the enormous size of the country; the weakness of public opinion due to the want of a metropolis in the European signification

of the term ; the conflict of laws among the various States ; the overlapping and confusion of laws in the same State due to a habit, borrowed from this country, of enacting fresh statutes without considering the effect on existing legislation—a fertile source of confusion ; the hysterical unscrupulousness of the Press ; the overwhelming temptations offered by predatory wealth, and, last but not least, the fact that lawyers rather than the people have come to be considered the custodians of the Constitution.

We all know [said Mr. Roosevelt at Harvard during his Presidency] that as things are, many of the most influential and most highly remunerated members of the Bar in every centre of wealth, make it their special task to work out bold and ingenious schemes by which their wealthy clients, individual or corporate, can evade the laws which were made to regulate, in the interest of the public, the uses of wealth.

Such an indictment is an unsolicited testimonial to the power of the Bar—a condition unthinkable outside Anglo-Saxondom. Never before has the head of a State paid such an unwilling compliment to a purely professional caste. Brahminism and Sacerdotalism have found a worthy successor in an unexpected quarter. Legalism has achieved a sway, not incomparable with theirs, without invoking supernatural sanction.

‘But surely,’ says an unsophisticated reader, ‘the President attached an altogether exaggerated degree of importance to the schemes of the Bar. The Bar is not everything. What of the Bench ?’

What indeed ! That is the crux of the situation. The Bench is rarely mentioned. It was not present in President Roosevelt's mind as an effective means of control on the schemes of the Bar. Following our system and for this Mr. Choate invokes the gratitude of his countrymen to the Inns of Court - the Bar in America produces the Bench and, like certain unnatural parents of a low type, it is now devouring its offspring. The process of deglutition is almost complete.

The result can be imagined. The Bench henceforward will cease and determine, except as an empty form retained merely to record verdicts and provide salaries for enfeebled members of the Bar.

Returning for a moment to ex-President Roosevelt's pronouncement : we submit with great respect that he speaks with imperfect knowledge of what has been already achieved in this country when he says that the American Bar have set themselves the task of working out bold and ingenious schemes for the benefit of their clients. Eighteen generations of English Legalists have anticipated them in providing not isolated schemes, but a complete and co-ordinated system for thwarting the course of Justice, encouraging the abuse of wealth and evading the punishment of crime. It is based on those great, those absolute principles which lie at the foundation of the ascendancy of the Bar. These principles are delightful in their native simplicity. This is Legalism in a nutshell : ' Penniless is powerless ; pile on expense, procure delay.' ' The mistake of a letter in an indictment acquits the greatest

criminal.' 'An ounce of Law is worth a pound of Justice.' 'There is no Deity but correct Form.'<sup>1</sup>

A few modern instances will prove our touching fidelity to these wise saws. It is on record that Lord Denman established his great reputation at the Bar by securing an acquittal in a famous case on the ground that a certain firm, described as proprietors 'of a silk and cotton lace manufactory,' should have been described as proprietors 'of a silk and of a cotton lace manufactory': it having been ascertained that they made both silk and cotton lace. English Legalism is by far the greatest and most respectable lottery in the world. There are numbers of important instances recorded where winning or losing turned, not on a word, but on a single letter. We read that a Judge in the year 1827 quashed an inquisition for murder because the jurors were referred to as 'on their oaths,' not 'on their oath,' the latter being the correct form. No further back than 1841 an important legal document was declared null and void because of the insertion of the letters 'A.D.' instead of the words, 'In the year of our Lord.' Only a few weeks ago, that is during December 1911, the Court of Criminal Appeal set a man at liberty, who had been convicted of a brutal murder, on the ground of omission or misdirection on the part of the Judge in the first instance. The defect of form was exceedingly

<sup>1</sup> 'La a forme, voyez vous, la a forme. Tel rit d'un juge en habit court, qui tremble au seul aspect d'un procureur en robe. La-a forme, la-a forme.'—*Brid'oison* in '*L'amour Médecin*.'

slight as is proved out of the Judges' own mouths. The judgment contains an ostentatious disclaimer of the interpretation that acquittal meant the Court thought the accused innocent ! Like Pandora's box, the Legalist bag of tricks has always Hope at the bottom, even for the convicted criminal.

Observe now how closely the American Bench and Bar have followed the example of this country. We pointed the way ; we lifted the latch. The patent rights are indisputably ours. This is an extract from the *Standard* of January 5, 1912, under the heading '100,000 Murderers at Large.' The article begins :

Something like 9000 murders are committed every year in the United States, says our New York correspondent. According to recent disclosures by a widely circulated weekly journal, 100,000 murderers are free and 75,000 of them have never seen the inside of a gaol.

Some amusing cases are cited of the way in which the law is evaded. In one instance a man escaped conviction for burglary because the indictment stated that six persons inhabited the house which he robbed, while the proof showed only five. In another case the Court dismissed the indictment because the word 'father' was spelt with two 'r's' in it. Another Court did the same because the letter 'l' was left out of 'malice' ; and still another because 'a' was left out of 'breast.' But the worst case known is that wherein a Court allowed a criminal to escape because the indictment described the crime as against the peace and dignity 'of State' instead of 'of the State.'

In Texas a man has been tried six times for the same murder. Four juries committed him and two disagreed. Three times he was sentenced to death and once to twenty-

two years in prison, but the Court of Appeal reversed the conviction every time and the prosecuting attorney at last gave up the case as hopeless.

Observe, further, this extract from Mr. Croly's 'Promise of American Life':

The criminal laws [he writes] have been so carefully framed and so admirably expounded for the benefit of the lawyers, and their friends the malefactors,<sup>1</sup> that a very large proportion of American murderers escape the proper punishment of their acts: and those dubious and dilatory judicial methods are indubitably one effective cause of the prevalence of lynching in the South.

It is not straining this passage to say that in the opinion of the writer the Bench is a negligible quantity. This extract is also a striking illustration of the direct connection between Legalism and lawlessness. The uncertainty of conviction when the slightest defect of form may outweigh the clearest evidence is the stultification of Justice, and '*ubi jus incertum, jus nullum*,' the door is open to Judge Lynch and the wild justice of revenge.

It is perfectly clear that while the American Bench and Bar have given convincing evidence of the intimate relationship between their Legalism and ours, there are present in America conditions—happily non-existent in this country—tending to exploit and intensify Legalism. To those enume-

<sup>1</sup> We read in the Press of January 30, 1912: 'After a record delay of 21 months Albert W. Walters was electrocuted to-day. He was condemned on April 22nd, 1910, to be executed on June 6th, but the lawyers exhausted every trick and device to delay electrocution.'



rated above must be added two of the most insidious description. These are widespread municipal corruption and acute racial questions. As an instance of the former, General Bingham, ex-Commissioner of New York, made the following statement in a magazine article in 1909 :

When such a man—a Sachem of Tammany Hall—on whom a Judge depends for political preferment, sends word to ‘be easy on So-and-so,’ it is not hard to see why the Judge browbeats and abuses the police, gives every advantage to the ‘shyster’ lawyer for the defence, and finally shouts that the evidence is insufficient.

On the subject of the disastrous interaction of Legalism and racial questions we shall call as a witness the author of ‘The Valour of Ignorance,’ premising that the racial or colour question occurs in the United States in two forms and two localities, namely the negro question in the Black Belt, and the Japanese problem on the Pacific Coast. Colonel Lea’s purview extends to foreign relations and more especially to those with Japan. Referring to the increasing lawlessness in America he says :

This Republic exceeds all other civilized nations in crime. . . . The diplomatic history of this Republic shows the fixed indisposition of the people to view foreign relations except in subordination to their national or class interests. . . . The predisposing causes of war with Japan are inherent in the overt acts of a portion of the people. . . . These Orientals are disfranchised and treated by the populace not alone with social unconcern, but with indignity. . . . They cannot appeal to the Courts where

their case may be determined by a jury, for the jury, being of the people, has decided that as heathen they cannot be believed on oath. . . . The motives, moreover, that actuate mob-lawlessness are identical with the spirit that directs municipal ordinances against them, the legislation of the State and the injustice of the judiciary.

We are now in a position to understand the terrible strain which such perplexing and apparently insoluble problems have put upon our native product since its transplantation in America ; and so its more startling developments cease to be matter for surprise. This is the place to admit that although the American advocate has been generally a mere copyist of our methods, yet in certain quarters he has shown originality. For example, he has far surpassed his masters in the glorification of his own order. That is partly a result of the effacement of the Judge ; in part, too, it arises from a new departure. We have long had the actor-advocate with us. America has evolved yet another phase, that is the tenor-advocate. The following quotation is from the *Sun* :

Counsel closed a powerful argument by singing to the jury in a tear-choked voice, ' Home, Sweet Home.' The song tumbled on his lips and brought tears to the eyes of all the jurors, the defendant, and the crowd that was packed in the room. It was a dramatic finish to the most dramatic murder trial in Texas. The verdict of acquittal was received with impressive demonstrations of applause.

The American Bar have proved that manipulation of juries is the most lucrative of the arts, and in this quarter, too, much ingenuity has been

developed. Conjuring with juries is not only a lucrative but a fascinating game. The author of 'Day in Court; or, The Subtle Arts of Great Advocates,' will give us the leading rules :

An advocate should bear in mind that he has only six challenges, and should not use them all before his opponent has exhausted his. I usually challenge two or three jurors right away, and then my opponent, never suspecting me of sparing with him on the question of challenges, goes ahead and exhausts his six, while I have three to the good. then I have the selection of the jury in my hands . . . Young men are safer than old men, unless the advocate is for the defendant, when he wants older men . . . If for the plaintiff, an advocate should remember that he must win the twelve, if for the defendant he needs only one . . . If he is defending in a criminal case, he needs all kinds of men on his jury, old and young, rich and poor, intelligent and stupid a German, an Irishman, a Jew, a Southerner and a Yankee. He should mix them all he can, let them fight it out among themselves and *agree if they can*

The italics are the author's. He is gleefully describing an important part of the tactics of Legalism, whose end and object are the gain and glory of the advocate. The Judge has been eliminated and Justice has nothing to do with the case.<sup>1</sup>

Finally, we must remember that among the novel features that have not been borrowed from

<sup>1</sup> Addressing the Annual Conference of the American Prison Association at Omaha, Judge Deaury, of Massachusetts, said that 'The administration of justice in the United States is a disgrace to civilization. During last year over 8000 persons were murdered compared with 7100 in 1910. Only 1 in every 89 of the murderers was punished.' (January 1912 )

this country is the position which the American Constitution assigns to the Judges of the Supreme Court. It is above the Legislature. 'It is the final arbiter of the destinies of the United States,' says Mr. Croly, whom we have already cited.

Thus the lawyer [he continues] when constituted as Justice of the Supreme Court has become the High Priest of our political faith. . . . The majority of American lawyers are not reformers. . . . The "existing political order having been created by lawyers, they naturally believe somewhat obsequiously in a system from which they benefit and for which they are responsible. This government by law, of which they boast, is not only a government by lawyers, but it is a government in the interest of litigation. It makes legal advice more constantly essential to the corporation and individual than any European political system. . . . They have corporations in Europe, but they have nothing corresponding to the American corporation lawyer. The ablest American lawyers have been retained by the special interests. In some cases they have been retained to perform tasks which must have been repugnant to honest men; but that is not the most serious part of the situation. The retainer which the American legal profession has accepted from the corporations inevitably increases its natural tendency to conservatism: and its influence has been used, not for the purpose of extricating the corporations from their dubious and dangerous legal situation, but for the purpose of keeping them entangled in its meshes.

Our readers will not fail to notice that we are confronted with a most peculiar paradox. The country which is pre-eminent among all others in possessing a government of lawyers is the most lawless country in the world. In a country where

the lawyer is placed on a pedestal above the legislator the law is despised. What is the explanation? Simply that government by lawyers promptly becomes government for lawyers, that is government in the interest of litigation. Litigation is furthered by attractive gambling chances. As these become more tempting, the divergence between Law and Justice widens. The next downward step is that adventure and revenge equally defy the law and take the shortest route to attain their ends. Thus our paradox resolves itself into a platitude. Another resemblance between Legalism and Clericalism is disclosed; and as the worst of all governments, that which is most fatal to religion, is government by priests, so the next worst, if indeed it is not quite as bad, is government by lawyers: Legalism is fatal to Law and Justice.

An interesting sidelight is cast upon this subject by a statement for which the author of 'The Valour of Ignorance' makes himself responsible. It is that the worst criminals in the United States are Germans. Now, it is well known that the occurrence of crime in Germany compares favourably with any other country in the world. Assuming the accuracy of the statement cited, how comes it that Germans have such an unenviable reputation in America? The explanation is that an extreme political section in Germany is never tired of proclaiming that the golden rule is the rule of the strongest; the dominance of the mailed fist, of blood and iron. (Bismarck's phrase was iron and fire.) If the Government of Germany sometimes

gives colour to the accusation that it has leanings to the doctrine of force in external affairs, no Government more sternly discourages it in home policy. Nowhere are misdemeanours, petty or grave, more certainly assured of punishment. The consequence is that adventurous and unscrupulous spirits, who long to carry into their personal relations with their fellow men the policy which they believe to be the best for nations, find no promising field for their experiments in their own country. The notorious lawlessness of America attracts them. They find that crime offers excellent gambling chances under the sway of Legalism. Nothing could better serve to illustrate the working of the rival systems. Ours is one with local embellishments: a Bar uncontrolled; a jury system abused; form elevated into a fetish; Legalism sold at fancy prices. The other is the antithesis of these features. Justice is cheap, certain, and expeditious. The consequence is that Law has come to be almost synonymous with Justice, and it is not openly despised as in America, nor profoundly mistrusted as in this country; it is regarded with a sentiment of sincere respect by the decent elements in the community. .

It is now our duty to inquire whether India has fared better than America under Legalism.

For much fuller information about this subject than was found possible to embody in this chapter, see Appendix G.

For further extracts from Mr. Croly and Col. Lea, see Appendix G.

## CHAPTER VIII

### BENCH AND BAR IN INDIA

'Although we possess for sufficient to exterminate every human being in a district where dacoit robberies are rampant, it is impossible to obtain convictions owing to the loopholes found by lawyers.' *James Mill*, 1810.

'Inexplicable acquittals encourage crime and ruin the prestige of the dominant race.'- *M. Chailley* in '*Administrative Problems of British India*,' 1910.

**D**URING a whole century—the great scientific century crowded with marvellous achievements—our legal system has proved as unprogressive in essentials as the laws of the Medes and the Persians. Devotion to the fetish of Bar and Bench—one and indivisible—has precluded improvement without conferring immunity from degeneration. *M. Chailley*, a friendly critic, expresses the opinion that things are going from bad to worse. Thus the medievalism of the West supplies solvents of Empire in the East.

Conditions are present in India which tend to turn the failure of our legal system to the direct discredit of the Government. The 'vakeel,' or native pleader, possesses in a supreme degree the subtlety of the Oriental. In his case the East has met the West without conspicuous advantage to either. Bar and Bench are jointly responsible for the vakeel. The Bar has 'called' him into

being and the tenderness of the Bench for sophistical refinements enables him to live and achieve an undue measure of importance.

His success consists too often in manœuvring the barrister-Judge to the side of the rich and unscrupulous litigant by dialectical fireworks—the will-o'-the-wisps of law. These have been from all time the delight of the Bar. The Judge's training renders him peculiarly susceptible to their influence. Hence those triumphs of technicality which all true friends of India deplore. The Judge's position is pathetic. Habits acquired at the Bar commit him to an unworthy rivalry in which his discomfiture is a foregone conclusion. It is one of the glittering fictions of the special pleader that 'the duty of the Bar is to aid the Bench in ascertaining the truth.' As a matter of fact, a certain section of the native Bar lay snares for the Bench under the triple stimulus of filthy lucre, professional laurels, and political disaffection.

The net is laid in the sight of the bird, and unfortunately not in vain. His idiosyncrasies prevent his seeing it. M. Chailley testifies to the frequent triumphs of the fowler. Crime is encouraged by acquittals inexplicable to the layman, and our prestige suffers. Thus we find that the legal history of India re-enforces the lesson taught by the experience of the United States. In both countries we find Legalism conducing to lawlessness. But there is this important distinction—that whereas we are no longer directly responsible for the vagaries of a system which we introduced into the United States, our responsi-



bility as regards India is unquestionable. We are therefore doubly culpable in adhering to a discredited system because it cannot be maintained that there is no alternative. It happens that India exhibits a convincing demonstration of the success of quite another system worked on diametrically opposite lines.

This is the institution of Civilian-Judges. They form one-third of the Anglo-Indian Bench. Their record is a bright page in the legal history of India. It is not too much to say that, even if we had no evidence from continental countries, the result of this interesting experiment in India would suffice to establish the soundness of the principle that the Bench should not be recruited from the Bar.

In scarcely a single instance during the last quarter of a century have the members of the Judicial Branch of the Indian Civil Service been concerned in failures of Justice ; although during that period some of these failures assumed the proportions of a public scandal. These Judges are the true friends of the dumb millions of India, and as such they have encountered the relentless hostility of the unscrupulous oppressor and the disloyal intriguer.

Not only so, but an important section of their own countrymen look at them askance : they are considered interlopers by the Bar. And as Calcutta is second only to London as the headquarters of the legal profession, the position of the members of the Judicial Branch is somewhat unenviable. When they are manifestly in the right, the support

accorded them by the Government is lukewarm and half-hearted. But when the most trifling mistake is made by Civilian-Judges they are soundly rated, whereas outrageous blunders perpetrated by their barrister colleagues pass unnoticed. To such lengths is this deliberate and unwarrantable preference carried that the barrister-Judge who speaks no word of any Indian tongue, and has to be constantly 'shepherded' and kept out of harm's way by his Civilian colleague, is actually promoted over him to a Chief Justiceship. It will hardly be credited that the Government in its wisdom has decreed that no Civilian-Judge, however distinguished, can be appointed to a Chief Justiceship or to be legal member of Council. Those positions of honour and emolument are confined exclusively to members of the Bar.

Their assumption of superiority to the Civilian-Judge has rarely found such frank expression as Sir Erle Richards, K.C., K.C.S.I., gave it on the occasion when he presided at the reading of a paper by Sir Robert Fulton, M.A., LL.D., before the East India Association and published together with an exceptionally interesting discussion thereon in the July number of *The Imperial and Asiatic Quarterly* for 1909. Sir Erle said 'he differed, *in toto*, from the author of the paper as to the expediency of throwing open Chief Justiceships and memberships of Council to Civilian-Judges! The opposition to that course would be too serious for any Government to face. He therefore dismissed the subject as not being within the range of practical politics.'

• This pontifical pronouncement leaves nothing to be desired in the way of outspokenness. In the slang of the period Sir Erle is a 'whole hogger.' But it may be suggested with all respect that he naturally mistakes the certain meaning of the Bar for the problematical opposition of the country. '*Vous êtes orfèvre, M. Jossé.*'

The important point, however, is not that Sir Erle Richards accepts the superiority of the barrister-Judge as axiomatic: what concerns India is that the Government has hitherto proceeded precisely on that assumption. This is a case of unblushing Byzantinism. It is irrefragable evidence that purely caste interests prevail against those of Empire. Narrow professional interests are subserved by the barrister-Judge. Learned, upright and honourable, he is too often the instrument of injustice owing to circumstances beyond his control. The system is to blame, not the individual.

If the reign of Legalism be our ideal, then the superiority of the barrister-Judge is unquestionable. But if we desire the reign of Justice, then we are compelled to regard the alleged superiority of the barrister-Judge as one of the most audacious, one of the most mischievous fictions ever promulgated in the interest of privilege. There are picturesque fables to which mankind have agreed to extend a certain measure of indulgence, but this is not one of them.

The issues involved are indeed of the gravest character, and we make no apology for treating the matter before us at some length. We propose

to bring forward evidence which will carry conviction to the mind of any unprejudiced reader. We shall show that our Legalism, transplanted in India, is being exploited on a vast scale to the grievous disadvantage of our rule. We shall find that a Government composed mostly of lawyers, as our Cabinets are unfortunately more and more, is a Government for lawyers, thus repeating the experience of our American cousins cited in the last chapter. Moreover, a Government by and for lawyers is a Government in the interest of litigation. That description is strictly applicable to the Government of India during the past century. This grave defect was clearly pointed out by the elder Mill a century ago. His criticism is not less but more applicable to-day. It is a hard saying. But the seamy side of our Island story is the seamy side of our Indian record. We have given India of our best. We have spared neither blood nor treasure. We have overcome difficulties and attained a measure of success to which history can offer no parallel. Our Empire-builders, soldiers and administrators have raised a great edifice, superb in outward seeming. The sincere desire of the race is that its foundations should be well and truly laid in Justice, the only sound foundation of Throne or Empire. A genuine love of fair play is a prominent characteristic of the Anglo-Saxon race. But never since the Norman Conquest have we succeeded in realizing our ideals in our legal system. Our legal history is the record of this failure. The legal history of the United States is bringing corrobora-

tion, in an appalling development, of lawlessness and a perfect orgy of unpunished crime. The same evil influence is at work in India. The foundations of our fair structure are being undermined by the silent, sinister, corrosive action of Legalism.

The very year in which James Mill wrote the passage at the head of this chapter, the Government decreed a general increase of Court fees with a view to check litigation in India. The Cabinet then, although perhaps less than now, ran on strings pulled by the Bar in regard to any matter connected with Law. A whole century is a fairly long time to test the wisdom of a given policy. Evidence has been steadily accumulating and all in the same direction. From all quarters we learn that litigation is increasing. Yet, such is the inconceivable folly of the Government, or such is the overwhelming force of vested interests—the Government may choose that particular horn of the dilemma which seems the more attractive—that the century-old folly is adhered to to-day.

‘The Government consoles itself,’ M. Chailley writes in the work cited, ‘for its relative powerlessness by the idea that dear Justice prevents suits.’ This contention was riddled over a hundred years ago on *a priori* grounds. It has been long since torn to shreds by the experience of neighbours who have proved to demonstration that not expense of process, but certainty of result, is the controlling factor in checking litigation. And that, on the other hand, great uncertainty and favourable gambling chances—even for the worst

suits—constitute a powerful stimulant to litigation, notwithstanding heavy expense.

M. Chailley continues: ‘And those of its officers who come in contact with the people are recommended to make them understand that litigation is ruinous and should be avoided.’ That is to say, the offices of the Government lottery are open, prizes are being won for a missing letter, and a notoriously litigious people are advised not to play! *Qui trompe-t-on ici?* Whether the hand of Simple Simon or Serjeant Buzfuz is visible in this policy, it is unworthy of the Government of India. ‘The people do not accept this reasoning,’ our author tells us, and an opinion is being gradually formed which is by no means favourable to British Justice. ‘It is not the usurers,’ it is said, ‘who are ruining the country: it is the Courts with their fees, their pleaders, their procedure. Matters have been arranged in the interest of the rich, whose money can assure them the best lawyer and a favourable judgment.’ Are the champions of expense surprised? This is exactly what might have been foreseen. It is what the critics of the legislation of 1810 foretold.

When legislators propose [James Mill said] to ‘drive people from the Courts of Justice by expense, they must of necessity imagine that it is the dishonest parties only whom the expense would deter; for it would be dreadful to make laws to prevent the honest from obtaining Justice. But is it easy for the wit of man to frame a proposition stamped with stronger characters of ignorance or corruption? That to render access to Justice difficult is the way to lessen the number of crimes. What is the

greatest encouragement to injustice ? Is it not anything which tends to prevent immediate redress ? In all systems of procedure which by technical forms renders the judicial business complex, intricate, full of snares and subtleties, the chance of success to injustice, in a vast majority of cases, is very great. This chance most assuredly is a producing cause of a vast proportion of law-suits.

A century has passed, and this is what we read in the Blue Book, 'East India (Progress and Condition) 1909-1910' :

In Bengal the number of civil suits rose out of proportion to the number disposed of.

In Eastern Bengal and Assam the number of cases in the pending file continued to rise.

In the North-West Provinces there was a further increase in the number of suits instituted.

In the Central Provinces and Berar litigation showed an increase of sixteen per cent.

In the Punjab the civil suits rose by over 20,000.

In Bombay there was a slight rise in the number of civil suits.

In Madras a fresh increase in litigation led to the creation of two temporary Judge's Courts.

We are now in a position to understand what a flourishing institution the Bar is in India and the extent to which 'it sucks the substance of the people,' in M. Chailley's expression. He will tell us how the process is carried on.

The lower tribunals [he writes] content themselves with proofs which rest on what may be called common sense. But the Superior Courts have a higher standard, which often renders conviction impossible. The inferior

tribunals seeing their convictions set aside, set up like exigencies with the result that criminals profit and public security is menaced. The magistrates are indignant and the Executive, at least in some of the Provinces, ask for remedies. It is supported by the bulk of native opinion, but not by the Babus, the men of the University or the Bar.

The Babus and the Bar have made common cause. The astuteness of the East has met and embraced the Legalism of the West with the result that, according to M. Chailley, 'the condemnation of a British Court is not held by native opinion to involve moral degradation.' So great is the uncertainty, so many are the chances of failure for those who cannot employ clever pleaders and appeal to higher and still higher tribunals, and so favourable are the chances of those who can command sufficient means, that all ethical considerations disappear and our legal system presents itself to the native mind as a promising gamble for the rich.

Nor is this impression confined by any means to the native mind. In the *Imperial and Asiatic Quarterly*, mentioned above, there is an article entitled 'Indian Courts and Indian Unrest,' in which we read :

No decision is final. An injured person, generally some poor cultivator, may have to travel on foot some 300 or 400 miles, spend weeks in a strange city among people speaking a foreign tongue, and waste large sums of money in defending a perfectly just decision, which the Law had specially declared to be final. The rich offender, on the other hand, pours out money, employs powerful advocates,



and wins his case in the enforced absence of the man he has injured. We used to say, in our talk among ourselves, that the Calcutta High Court was an excellent Court for the protection of the rich against the poor.

By kindred processes the same Court has achieved an unenviable notoriety in criminal procedure. We read in the Press of November 27, 1910, that -

• A year and a half after the trial began, the High Court of Appeal in Calcutta gave judgment on the Anarchist conspirators who were arrested after the murder of the Kennedy ladies in May, 1908. Through a technical informality the two chief criminals have escaped the death sentence.

A whole volume might be filled with such instances, but these will suffice to illustrate the manner in which our home traditions of Legalism aid the rich in civil causes to oppress the poor, help the criminal to evade Justice in criminal cases, and bring a huge volume of business to the Bar under both categories.

Here the question naturally occurs to the reader's mind, how is it possible that our barrister-Judges, learned, upright and honourable men, who aid and abet such a system, make themselves its High Priests ? This opens out a psychological problem of surpassing interest. For, be it observed, there is no recorded instance of self-deception being carried farther than this: we find learned, upright and honourable men making themselves responsible for the perpetuation of a nefarious system; and what is more, making this idiosyncrasy the basis of a claim to superiority over colleagues who do

not suffer from it, who administer Justice as opposed to Legalism !

Various factors contribute to this extraordinary phenomenon. The vested interests, the long traditions of the Bar, whence these Judges come, account for much ; but the special condition favouring Legalitis in India is the interaction between the imported Legalism of the Bar and the Oriental subtlety of the native pleader. We have called this an inauspicious association of East and West. The following extract from an article that appeared in the *Calcutta Englishman* on October 26, 1910, will throw a flood of light on the singular condition of mind which is induced by the play of the two allied forces just mentioned. The article begins :

To the lay mind it is a matter of considerable surprise that, for some years past, a controversy has been going on in the High Courts of India as to the meaning of the word 'Court' in Section 476 of the Code of Criminal Procedure. This is the Section of the Code which prescribes the procedure to be followed by a Court when an offence against public Justice—such as perjury—is committed before it. To the uninitiated it may appear impossible to suppose that the word 'Court' can mean anything but the office of a Judge. Judges may come and go, but Courts go on for ever. Nevertheless a fierce battle has been raging for years as to the meaning of this word between the two classes of Judges who sit on the High Court bench, viz. those who consider that they have only to interpret the Law according to its obvious and natural meaning ; and those who consider themselves entitled to exercise the function of legislators and to interpret the Law according to the policy which in their opinion

should underlie the Law— a practice which we may say, in passing has been over and over again condemned by their Lordships of the Privy Council. . . . The trouble began in 1905 when the former Chief Justice of the Calcutta High Court, Sir F. Maclean, decided in a case of a prosecution for perjury that no one but the particular Judge before whom the offence of perjury was alleged to have been committed could sanction a prosecution. . . . The consequence of this decision seemed likely to be disastrous. . . . A witness who sees the officer before whom he is cited to give evidence under orders of transfer may come before him and lie with confidence and impunity. . . . In 1907 the question came before a Bench of two of the Judges of the Calcutta High Court, including Mr. Justice Rampini, who thought it their duty to refer the question to a Full Bench. Sir F. Maclean, the correctness of whose decision was called in question, presided over this Full Bench. Neither of the referring Judges was, according to the usual practice, selected to sit on it. The result of the Full Bench, accordingly, was that Sir F. Maclean's decision was affirmed. . . . Then the Madras High Court took it up and, although not without dissentients as a matter of policy affirmed the decision of the High Court of Calcutta. Then the Bombay and Allahabad High Courts rushed into the fray and gave weighty and cogent reasons for considering that their brethren of Calcutta and Madras were manifestly wrong. . . . Finally it was decided by a Special Bench that the word 'Court' is to be understood as bearing its 'natural meaning' with the sense of continuity. . . . A curious circumstance in connection with this Special Bench is that one of the Judges who sat on it was also a member of the Full Bench who, in 1907, decided the opposite.

After five years' gestation the Legalist mountain brings forth this ridiculous mouse! The united

Benches of four High Courts, some score of Daniels, come to judgment and decide that the correct interpretation is the natural meaning. That is precisely what the man in the street does at sight without wandering through mazes of futile, argumentative twaddle. While those learned, upright and honourable men exhausted the resources of casuistry during many wasted weeks, matters of grave interest to litigants were hung up. It is manifest that we are in the presence of no ordinary obsession. The position of its victims is its chief claim to notice.

When the Greek sophist declared that 'All Cretans were liars,' the rejoinder came that the propounder of the thesis was himself a Cretan and consequently 'No Cretan was a liar'; in this way gratuitous assertion and lurking fallacy were volleyed while morning wore to evening and little harm was done. When Greek sophistry passed into the phase of theological casuistry, it was imported into this island and it infected the Bench. The Bar welcomed it as a godsend and has exploited it with immense success ever since. Sanctified by whole centuries of acceptance, legal casuistry was imported into India, where it found an enthusiastic ally in the immemorial, shadow-chasing bent of the Oriental mind. This fateful combination forms a grave qualification to the proverbial luck of the British Empire. The barrister-Bench in our Eastern dependency, to judge by the evidence before us, has been so profoundly hypnotized by the Bar that it has lost

all sense of proportion. It is giving to barren dialectics what was meant for Justice. These ancient and discredited weapons are as much out of place for the performance of judicial duties as a razor is for cutting the leaves of this book. By using a razor the paper would be cut anywhere as readily as in the crease, with the added risk of the reader cutting his fingers. Moreover, the Judge is not in the irresponsible position of the Greek sophist or the medieval schoolman. Their doll's house has become his prison; their tonic his intoxicant.

English and American experience prove that the Legalist habit is incorrigible. We have a Legalist Government at home and in India. It is therefore probable that the characteristic symptoms will become more and more pronounced. The Bar will come into its own and absorb the Bench, rendering it powerless for good and all-powerful for evil. In a word, India and America are about to be confronted with the same problem—how to deal with the growing lawlessness and the insidious ravages of litigation, the twin forms of the Nemesis of Legalism.

It is a subject of grave discouragement to the friends of India that litigation has not been checked by the promulgation of an ambitious and beneficent scheme for simplifying the Law. It was announced by his Majesty Edward VII., in a memorable message to the princes and peoples of India, on November 2, 1908, in which the following passage occurred: '*The Law has been*

*simplified in form and its machinery adjusted to the requirements of ancient communities slowly entering a new world.*' It is to be regretted that no evidence is forthcoming to show that our Indian Empire has benefited by this well-meaning innovation. Nor is it even mentioned in recent<sup>1</sup> criticisms of our jurisprudence or procedure. Such reforms are doomed to remain in the limbo of half measures if they are not put into efficient hands. Laws are simplified and codification is effected in vain if the administration of Justice is left in the hands of barrister-Judges, hidebound in the old traditions, fettered in Legalism, ever ready to sustain every fantastic objection of India's sorrow—the barrister, English or native. When brand-new machinery is introduced, the psychological moment has arrived for superannuating the old operatives. The continual increase of litigation compels us to reckon this experiment among our long list of failures to come into line with our neighbours. We read in a previous chapter of tactics which defeated the Criminal Code ; we shall see presently that there is excellent ground for believing that the codification fiasco in 1878 was the result of a manœuvre. It may be taken as axiomatic that whatever the reforming minority may attempt, the majority of the legal caste will never take serious steps to discourage litigation. There will be deceptive appearances of reform occasionally

<sup>1</sup> The author of *Indian Unrest* has the following : 'The politician, for instance, is too often a lawyer, and he has thriven upon a system of jurisprudence and procedure which we have imported into India with the best intentions but with results that have sometimes been simply

heralded with flourishes of trumpets; but in the practical administration of those much-vaunted measures, the High Priests and the myrmidons of Legalism will take care that beyond a few paltry concessions the old order will be altered as little as possible.

And yet we would fain hope that our people will one day be roused to demand and obtain the boon of cheap Justice for these islands and for India. When that auspicious day dawns we shall no longer abandon the Indian Law students to the atmosphere of the Bar and the Inns of Court. We shall provide them with sound guidance, and help them to cherish lofty ideals of Justice. At present we do neither. The acute Oriental mind quickly penetrates the trumpery make-believe of our Legalism. Its true inwardness, its hypocritical egotism is comprehended on the instant. The plausible pretexts of a pampered professionalism are strongly reminiscent of Brahminical fictions which subserved caste supremacy for centuries. The Brahminism of the West with its lip-service to Justice, and the interest of the public, tends to develop the least favourable side of the Oriental character. It has brilliance rather than depth. It often hides poverty of thought under magnificence of expression. In weaving gossamer webs of sophistry it has nothing to learn from the Greeks of the Lower Empire. For these intellectual

disastrous to thriftless and litigious people. Hence the suspicion and dislike entertained by large numbers of quiet respectable Indians against any measures which tend to increase the influence of the vakeel and the class he represents.'

vagaries the atmosphere of the Bar is a stimulus, not a corrective. Western chicane opens out fresh and fascinating horizons. To men of weak moral fibre it offers a new and formidable armoury of effective weapons and an assortment of masks and disguises.

It is most deplorable that those of the Law students who are disaffected to our rule—and this is oftener the way of thinking that recommends itself to Hindu than to Mohammedan youths—find in the words of a Lord Chancellor of England a plausible justification for treasonable practices under cover of sacred duty :

The advocate must not regard the suffering, the torment, or the destruction he may bring upon others ; he must go on reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client

To a certain type of Hindu mind this rhodomontade recalls the mandate of the goddess Kali Mata to the Thug about to start on an expedition. And, as a matter of fact, the lower fringe of the vakeel fraternity are not unworthy successors of the Thugs. A species of legal Thuggee is rampant in India. Lord Curzon has denounced ‘the sharks in human form that prey upon the unfortunate people.’ That tribe, in so far as it is composed of the limbs of the law, is a baneful product of our Legalism, which is their stock-in-trade.

A well-ordered State would recognize the paramount importance of training and directing the



brilliant but dangerous gifts of our Indian fellow-subjects, who devote themselves to the study of Law. Their achievements in this domain may be gathered from the results of the Michaelmas examinations, published on November 2, 1911. In Roman Law, Class I., the first; in Class II., the first three; in Class III., the first five were natives of India. In Constitutional Law, Class III., the first is a native of India. In Criminal Law, Class I., the first; Class II., the first four are natives of India. In Real Property and Conveyancing, Class II., the first two are natives of India.

Common prudence, such a sentiment as would appeal to the manager of a commercial enterprise, let alone considerations of enlightened statesmanship, suggests that the flower of these young men should be offered the advantages of a careful training for the exercise of judicial duties. It is written for our instruction that other communities have adopted this common-sense policy with marked advantage. If our Government's neglect to adopt a similar policy with regard to England is a grave dereliction of a paramount duty, as regards India it is a great betrayal. Among the congeries of races that form its vast population, the lamb-like helplessness of one section is an invitation to the wolf-like rapacity of another. And although the multi-millionaire and the bloated Trust are alike conspicuous by their absence, it is nevertheless true that petty oppression, engineered by an elaborate system of chicane, flourishes greatly under the *ægis* of the British

power. This is the dry rot which menaces the foundations of our Empire. Is that fair structure to be sacrificed to the Babus and the Bar ?

For further information relevant to this subject, extracts from various authorities, such as James Mill, M. Chailley, Sir J. D. Rees, *The Times*, and other sources, see Appendix II.

See also notes in Appendix U, and more especially a leading article from *The Times* of March 6, 1912 and extracts from the same journal of June 19 and 20, 1912.

## CHAPTER IX

### A FAMOUS CASE

'By one of those strange coincidences which have marked the Mokau litigation, in all its various stages, not a single one of the London papers reported this very interesting judgment.'—*Truth*, November 7, 1901.

THE Press has the eyes of Argus. They are often blamed for prying too closely, rarely for being unobservant. In this case, where complete failure of publicity is alleged, there was excellent 'copy,' one would have thought. Its age alone should have attracted the caterers of public news. It was exactly seven years old at the date mentioned.

It had taken a certain portion of those years, and a large number of hearings before various Courts, to decide the rightful ownership of the Mokau Estate—a property situated in New Zealand, and said to be worth from £150,000 to £200,000. There was no manner of doubt that the rightful owner in 1894 was Mr. Joshua Jones. He had the best of all titles—the recognition of the New Zealand Legislature, in an Act passed in 1888. The district in which the estate is situated had been opened to Europeans, owing to the influence of Mr. Jones with the Maories.

He came to London in 1894 with the object

of selling the property, but no purchaser could be found. At this point the interest begins, and so do a series of actions at law. It was a 'hard case.' This is the puzzle. How can a man be despoiled of his property and kept out of it for seven years? There is another puzzle. How can a man survive seven years of litigation in straitened circumstances and consumed with anxiety for a large family 'down under'?

The answer to the first query is that it was done by an abuse of legal forms; to the second, that Mr. Jones is an athletic giant of six feet two or three, possessed of exceptional staying power; that he found friends and sympathy on the Press. To the Press, as a matter of fact, the recovery of his estate is due. One result of the campaign on his behalf in *Truth* was a 'run' on a bank which closed its doors to open no more. It may be mentioned, parenthetically, that one of the partners had advanced a sum of money to Mr. Jones's solicitor in order to repay a small mortgage with which the estate was burdened. The mortgagee having foreclosed, the estate was put up for sale and bought in by the solicitor on instructions from Mr. Jones, and on his behalf, as he understood. It appeared, however, that solicitor and banker had other views. They informed Mr. Jones that he would not be forgotten altogether; but that henceforward the Mokau Estate was theirs. They had bought it for themselves, not for him.

During the martyrdom that followed, these are some of the incidents which the unfortunate

proprietor of a large estate had to face: suits in bankruptcy; an action for libel resulting in conviction; a serious breakdown in health; repeated refusals of the Law Society to investigate; then an inquiry by the Society and a report unfavourable to the petitioner. From that decision he appealed to the High Court, which decided that 'a solicitor can only buy his client's property on his client's behalf; that the solicitor's intention in this case was so to buy it; that his subsequent claim to hold it adversely to his client was wrong and unprofessional.'

Our readers will probably imagine that this was an end of the matter: not so, however. There were three more years of litigation before the estate was finally recovered. This decision was only the beginning of the end, although at first sight it seemed to provide a satisfactory solution of this encyclopædic case, which was a triumph of chicanery and a belated victory for Justice. Surely this was first-class 'copy'; and yet not a single one of the London papers reported this very interesting judgment if the statement cited is accurate. So far as we know, it has not been challenged nor has the conspiracy of silence ever been explained.

There is not the least obligation on the Press to report all cases in the Courts. The only exception is the leading journal. Its Law Report is an official record, or all that we have in its place, until the reports appear in their permanent form after many days. The question arises whether such a failure of publicity, as that alleged, is not

the condemnation of private enterprise in Law-reporting, always supposing the statement mentioned to be accurate. In the leading journal, private enterprise, in a special province, is seen in its most highly organized form. And yet this development of enterprise is absolutely irresponsible in the domain of Law. That is not saying that it is necessarily, or even probably, inefficient or untrustworthy. On the contrary, it does its best; and we know what its best is; it is unapproached by any journal in the world—that fact notwithstanding there is something incongruous in any form of purely private, irresponsible enterprise in this field. The leading journal is on an entirely different footing<sup>1</sup> from that of a Government-owned journal, specially performing the duty of reporting cases in the Courts. From an official sheet such an omission as that alleged is unthinkable.

Nor was the date of November 7 the only occasion on which *Truth* called attention to similar omissions on the part of the leading journal. In its issue of May 2, 1901, referring to the Mokau case, the following statement appeared :

The facts have been most meagrely reported in the daily Press; *The Times*, indeed, hitherto so zealous on behalf of the professional integrity of solicitors, did not even allude to the case.

We know nothing of the zeal said to have been shown in bygone years by the leading journal on behalf of the professional integrity of solicitors; but

<sup>1</sup> See Appendix I.

we do know that in recent times it has done yeoman service for Law reform. A glance at our Appendices will satisfy any reader on that point. The splendid record of our great newspaper justifies us in counting upon a still more definite attitude on this subject; and, notwithstanding that its own interest will temporarily suffer, we are confident that its invaluable support will yet be extended on behalf of a demand that no intermediary whatsoever, no form of private enterprise, shall be permitted to intervene between the State and the people in the administration of Justice, whether such enterprise provides barristers and Judges or Law Reports.

This question forces itself on our notice in another form—not when failure to publish is alleged, but when the official character of the publication is not admitted. When an English subject makes oath and says in a continental Court of Law that he has won a certain case before an English tribunal, if the Judges admit the relevancy of the statement they naturally ask for a copy of the judgment. Instead of an official document signed by the Judge and stamped with the Court seal, a newspaper is handed up to them. They hesitate to accept it as official evidence. There follow long explanations of insular eccentricity in legal matters. The Bench is assured on oath that copies of judgments are never available for the parties to a suit in England. There is a brief consultation, with the result that the report of a judgment in a newspaper cannot be accepted. And thus whatever advantage might have accrued

to the litigant by due recognition of his successful suit at home is lost. Having regard to the interdependence of the economic relations all over the world<sup>1</sup> of to-day, it is surely time that we came into line with our neighbours and levelled the Chinese wall which still surrounds our legal preserves. In Germany official copies of judgment signed by the Judges and stamped with the Court seal are available to the parties at a charge of twopence-halfpenny per sheet of twenty lines. The time is past for asking whether this is England or China; at the pace China is moving it is more appropriate to invert a famous line and desire to exchange fifty years of England for a fortnight of Cathay.

The Mokau case illustrates an anomaly of English Law—the absence of immediate official reports of cases and the impossibility of securing duly authenticated copies of judgments. The same case supplies a singular commentary on the pretended equality of all men before the Law. It is an admirable theory. We shall now endeavour to ascertain whether it accords with the fact.

<sup>1</sup> We have Postal and Telegraph Conventions with all civilized States. Of scarcely less importance are the Railway Agreements about passengers and traffic with neighbouring railway systems. But in legal matters we find ourselves in the isolation of medievalism. We find that on such subjects as Marriage, for example, and Bills of Exchange, we decline to come into line with our neighbours.

For another reference to the Mokau case, and extracts regarding another famous case, that of Stoddart, see Appendix 1.



## CHAPTER X

### EQUALITY BEFORE THE LAW

‘All men are equal before the Law. *Old Legend.*

THIS is part of the spurious coinage which passes as legal tender. The wide currency it has gained indicates the idealism of the nation and the homage which Legalism tactfully pays it. This ideal, unfortunately, is so far from being realized that nowhere are men so signally unequal before the Law as in Anglo-Saxon countries.

In the early years of the nineteenth century a Judge had been dilating on the great legal ‘principle’ that ‘no man is so low as not to be within the Law’s protection.’ Whereupon Bentham makes this cogent criticism:

Ninety-nine men out of a hundred are thus low. Every man who has not five and twenty pounds to five times five and twenty pounds to sport with in order to take his chance of Justice—I say chance remembering how great a chance it is that, although his right be as clear as the sun at noon, he loses it by a quibble. And this is the game a man has to play again and again so often as he is involved in a dispute or suffers an injury. Whence comes this? From extortion, useless formalities, Law gibberish, and Law taxes.

It is not denied that some of the worst abuses of Bentham's time have been swept away. Estates are no longer 'milked' in Chancery. But, on the other hand, fees have risen enormously. Barristers' fees in England and America have reached figures unimagined in other communities that suffer less from the cult of advocacy, and the tendency is still upward. But apart from barristers' fees, Court fees establish pecuniary tests, which render the equality of all men before the Law an empty boast.

Observe the practical effect of a high tariff round Justice. First, as regards unscrupulous debtors. It is a matter of common knowledge that there are certain depredators who deliberately refuse payment of just debts, counting on the reluctance or inability of their victims to have recourse to legal proceedings. It was stated in Court during November 1911, that one of these birds of prey had over 350 petitions in bankruptcy lodged against him. That was said to be a record. But solicitors are well aware of the fact that there are numbers of men against whom scores of petitions have been lodged<sup>1</sup>; but they have never been bankrupt. They can and do pay under adequate pressure. Now consider those of their victims who cannot afford to take proceedings, pay for writs, or launch petitions in bankruptcy. They are robbed, without hope of redress. But, although no outcry is made, it is not to be sup-

<sup>1</sup> In a notorious case that came before the Courts in the early part of the year 1912, no fewer than 215 petitions had been lodged against the debtor since 1902.

posed that such a condition does not produce exasperation and disgust. The natural outcome of this inarticulate grievance is undoubtedly a factor in that strange apathy which is deplored by those who work in national causes.

Let us now take the case of the creditor in straitened circumstances, who is driven to try his luck in an action at law. He casts round for a solicitor who will take up his case on the basis of payment by results. A respectable firm will rarely do this. So a shady one is found, and nine times out of ten the matter is settled over the litigant's head as soon as a clear profit for the solicitor is shown. Or, as not infrequently happens, the speculative firm is 'squared' and the doubly-duped client is once more left lamenting. So much for the enormous number of petty cases which never come to a hearing at all.

But in respect to those cases that are heard in Court, in how many instances can it be maintained with truth that plaintiff and defendant are equal before the Law. Unless their financial backing is fairly equal—and high fees, the uncertainty of the jury system, delays, appeals, fresh trials tend to subject the apparent equality to a severe test—our boast is seen to be vain. Not only so, but still more intangible factors contribute to reduce the chance of practical equality. Our Judges are known to be learned, upright, and honourable men. Observe, however, that these admirable qualities do not comprise the characteristic gift which should distinguish a Judge, namely the judicial faculty. All our Judges have been

advocates. To the litigant's sorrow some remain<sup>1</sup> advocates when the necessity to ply the advocate's trade is no longer forced upon them. The advocate on the Bench generally becomes counsel for the prosecution from the moment the case is opened. Thereupon the titular counsel, knowing that the result is a foregone conclusion, tactfully leaves matters to take their course; his attitude to the accused is sympathetic. There are so many convincing points, he will not stress any one unduly. Nothing impresses the jury more than this subdued and pitying confidence. This environment is fatal to the defence. In summing up, the Judge dilates on the forbearance shown by the prosecution, and not infrequently grave injustice is done. When the accused is unfortunate enough to find himself before such a Judge, with the added disadvantage of a markedly inferior social position compared with that of the plaintiff, then, indeed, the last tattered remnants of equality are thrown to the winds.

Does anyone conceive it possible that Mr. Joshua Jones could have been kept out of his estate during all those years, if the consideration due to an eminent solicitor and a well-known West End banker had not entirely outweighed the soundness of the claim of an unknown litigant from the other side of the world? Driven to despera-

<sup>1</sup> In a leading article in *The Times* of February 9, 1911, the following passage occurs: 'We could name Judges who, it was freely said, shone as advocates on the Bench more than at the Bar, who could not always forget that they had been party men, and who, to the last, showed, when they got a chance, that they had been faithful to their first love, politics.'

tion he published certain statements regarding his adversaries. These statements were afterwards held to be substantially true by the Court of Appeal. The present writer, being in possession of the facts, was in Court during the trial, which resulted in a conviction for libel. There are occasions when a singular fatality seems to attend the administration of the Law—we prefer to omit all mention of Justice in this case. Mr. Jones might have been excused if he had failed, like Mr. Pickwick, to recognize his own suit. No doubt he was technically guilty of libel. But no one could less resemble a venomous libeller. Mr. Jones had a grievance which the prosecution and the Court treated as a hallucination. Mr. Jones was only beginning to get accustomed to the atmosphere of Courts. He was unwary of speech to the last degree. He was ignorant of Law: he craved vainly for Justice. Its failure in this instance was not so much owing to the fact that certain incidents were distorted as that the whole perspective was false.

The unctuous rectitude of the prosecution would not for a moment desire to press hardly on a misguided man, whose friends should advise him to leave London, where he was cherishing delusions that threatened to undermine his constitution.

A surfeit of this claptrap produced a violent reaction on a listener congenitally impatient of Pecksniff-cum-Chadband. Lawless and uncertain thoughts took possession of him. Our civilization pictured itself as a contrivance for

bringing together at great cost a group of learned, upright, and honourable men, befittingly wigged and gowned, who play a game for the liberty or property of their fellow-men with all due solemnity.

And yet the observer, whose disgust at this pretentious jugglery was deepening into physical loathing, had seen men and cities; also legal vagaries not a few. He had seen the executioner's myrmidons swoop down upon an unlucky prisoner, who persisted in affirming his innocence after conviction: a thing not to be borne. They placed him on his bare knees on the folds of a stout iron chain. Then they wound five cords deftly round his thumbs, big toes, and pigtail, four scraps of parchment being placed between thumbs, toes, and the cords as prescribed by law. The cords were next pulled tightly through a hole in a beam behind the prisoner's back and somewhat above the level of his head. Quivering in every limb, and stretched like a trussed fowl, he still refused to acknowledge the justice of his sentence. The cords were drawn still tighter at a signal from the Judge, and then unconsciousness gave the sufferer a temporary respite from his tormentors.

Mr. Jones was spared the punishment of the 'five cords,' but his harassed existence, the repeated triumphs of injustice, the utter hopelessness of the outlook and the crocodiles' tears of his oppressors finally precipitated a nervous collapse, and he passed many weeks in hospital reflecting less on the glorious uncertainty of the law than on the absolute precision with which its operations

may for a time be manipulated. But for an exceptional physique and extraordinary recuperative powers Mr. Jones's estate and his life would alike have been sacrificed to the inequality of men before the Law. Adolph Beck, an innocent man, passed from this very Court to penal servitude.

All through the various circles of the purgatory of Legalism we are struck by the fact that, where the reality is specially repulsive, the Byzantinism masking it is uncommonly bold. '*De l'audace,*' says the Legalist Curia to its hot gossellers, '*et encore de l'audace et toujours de l'audace.*' Long experience has proved this to be the best, the only possible policy: nor would a less heroic exhortation be worthy of such a cause. For if we abandon the attempt to find a general justification for the legend under discussion, and restrict its application to the highest circle of the legal hierarchy, we shall find a favoured inner coterie whose privileges, prerogatives, honours, and emoluments have the special characteristic which Lord Liverpool praised in the Order of the Garter—'*There is no d——d nonsense about merit connected with it.*'

It is a trite saying that our Judges are the spoilt children of the State. This catchword is only true with considerable qualifications. Some Judges are the spoilt children, others are the step-children, of the State. Nor is it the possession of judicial capacity that marks the distinction. On the contrary, the record of the Civilian Bench in India is incomparably better than that of their

barrister colleagues.<sup>1</sup> The difference is that the *ægis* of the Inns of Court is over the latter. Their blunders may be phenomenal: they often are, and for these the system is to blame more than the individual. For it is equally irrational to blame a man for being devoid of knowledge of the opinions and character of the peoples of India as for being devoid of the judicial faculty, when he is promoted to the Bench for reasons quite unconnected with either. He finds himself a Judge of the High Court without any previous experience of judicial duties. The Civilian-Judge, on the other hand, has spent long years in the performance of these functions as District and Sessions Judge.

<sup>1</sup> M. Chailley writes: 'The independence and integrity of the barrister Judges have never been questioned, though they are justly reproached sometimes with ignorance of the opinions and character of the peoples of India. Their want of knowledge is, however, tempered by the fact that they have experienced civilians and natives of India as colleagues.' See also Sir J. D. Rees' letter, under Appendix H.

The *Calcutta Englishman*, of February 23, 1911, reports a case tried before Mr. Justice Fletcher, when the following incident occurred:

Mr. Bose: I submit I am entitled to get the name. Will you give me the name of your informer?

Witness: They are private informers.

Mr. Bose: I do not care.

Witness: I decline to give the names.

Mr. Justice Fletcher: You must. If you do not care to state them, you may write them down.

Witness: Unless I get permission from my superiors, I cannot give the names.

Mr. Norton referred to Section 129 of the Evidence Act and said the communication was privileged.

Here is a barrister-Judge so little familiar with the Evidence Act that he is unaware of one of its most important provisions, which is intended for the protection of people who give information to the police. Let us suppose that there is a native pleader on either side, both disaffected to the Government and in collusion, then such ignorance as this, on the part of the Bench constitutes a grave danger.



He brings to the High Court Bench a ripe experience of the native character, the peculiar idiosyncrasies of various races and many castes, and an extensive knowledge of Hindu and Mahomedan law.<sup>1</sup> Notwithstanding these qualifications he is still the step-child. The ermine to which he does infinite credit does not procure him more than the merest shadow of equality with the nominees of the Inns of Court. The slightest error of judgment in the most difficult case is made the subject of a report, and not infrequently of a reprimand. In a recent case<sup>2</sup> a magistrate took

<sup>1</sup> M.Chailley writes: 'The Civilian members of the High Court are chosen from among the District Judges. I give, as an instance of the career of a Civilian High Court Judge, that of Mr. Justice Crowe, formerly a Judge of the Bombay High Court. He entered the Civil Service in 1867, and during the first five or six years was employed on executive work, and took a share, *inter alia*, in the production of the *Bombay Gazetteer*. In 1872, when he had already some experience of men and things in India, he adopted the judicial career. He became first an Assistant and then a District Judge. When he was finally called to the High Court in 1900, he might well claim that no one was better fitted to furnish his barrister colleagues, who might be more skilful jurists, with accurate information on the economic and social conditions of the people with whom they had to deal. The service of nearly all the Civilian members of the High Courts give them similar claims.'

There are well-known cases of candidates for the Civil Service failing to qualify for admission time and again, giving up the quest in despair, getting 'called' to the Bar, and being promoted over men who had passed with distinction.

<sup>2</sup> This is the famous Midnapur case. Recapitulating these cases, the leading journal in its issue of June 19, 1911, asks: 'What are the reasons of the muddle which these successive incidents reveal? The first is unquestionably the weakness and inefficiency of the Bengal High Court. The administration of Justice in Calcutta has almost reached a deadlock. No more glaring example can be found than the Midnapur case, the interminable duration of which has become a public scandal.'

vigorous action in a district honeycombed with sedition. The existence of a criminal conspiracy was proved to demonstration. That fact notwithstanding, a certain arrest ordered by the magistrate was made the subject of an action for damages. The barrister-Judge, while expressing his belief in the honourable conduct of the defendant, considered it his duty to inflict a small fine in view of the unwarrantable arrest, which, by the way, was an unwarrantable assumption on his part, according to equally competent opinion. Be that as it may, it is reported on good authority that the fine of £66 carried costs to the tune of £26,000. Such are the triumphs of the Babus and the Bar. It is a victory that costs the Empire dear. It disheartens friends and encourages enemies. It is, moreover, a painful demonstration of the fact that Legalism is essentially a caste system which repudiates real equality, but parades its fantasm for the edification of the laity.

For some reports of freak sentences, see Appendix J.

## CHAPTER XI

### THE COMMON LAW

'Half the Law is called Statute Law and is made by Parliament. The other half is called Common Law and is made, how do you think ?

'By the Judges without King, Parliament or People. How should lawyers but be fond of this brat of their own begetting ? It carries in its hand a rule of wax which they twist about as they please ; a hook to lead the people by the nose and a pair of shears to fleece them withal.'—*Jeremy Bentham*.

**D**ESPITE unsparing denunciation by Bentham and the untiring efforts of a group of his disciples, the champions of the Common Law remain masters of the field and codification is still deferred. In 1822 Bentham made a grave charge against the legal profession, of whose ascendancy the denial of codification is a striking illustration. This ascendancy was achieved, according to Bentham (called Jeremy because he was destined to bewail the endless shortcomings of the Law), 'by keeping the rule of action in the most complete state of uncertainty and confusion possible.' This is, in effect (we may mention parenthetically), the accusation which Lord Chancellor Loreburn brings against the solicitors of the present day in respect of the registration of titles to landed property.

Bentham's metaphor of the rule of wax finds complete justification in the perversion of the Law

of inheritance in this country, by clandestine manipulation of the Common Law without a single line of legislative enactment. At one time a man could only dispose of the whole of his personal property if he left neither wife nor children. If he left either, he could dispose of one-half; and of one-third if he left both. The shares of wife and child were called *pars rationabilis*. This is expressly mentioned in Magna Charta. 'At what time the right of disposition of the whole personalty superseded the old law is uncertain.' The right of bequest in the province of York, the Principality of Wales, and the City of London was not assimilated to the general Law until the period between 1693 and 1726.

We may well ask ourselves whether the history of any other country, with a claim to an established juridical system, presents such an enigma as that contained in the passage cited. And yet it is difficult to mention more important measures than those which concern widows and offspring. The change introduced by a side wind was essentially subversive and revolutionary. It was grossly unjust in its immediate incidence and doubly disastrous in its repercussion on illegitimate children. For if those that are born in wedlock have no assured birthright in Law, what may those others expect?

Various attempts have been made to explain the steps by which this grave innovation was effected. The champions of the Common Law prefer to pass the matter over in silence. We are less concerned with its secret history than with the

fact that it was a great betrayal of untold generations of widows and orphans. It is indeed a startling illustration of the danger of trusting to tribunals without definite guidance from codes. Moreover, it accentuates a feature in regard to which Anglo-Saxondom differs from all other communities, inasmuch as its jurisprudence—that singular mosaic without purpose or plan—is continually modified by influences which are independent of legislation. There is, first of all, the vague and ill-defined chronicle of immemorial custom known as Common Law. Secondly, the mysterious stream whose muddy waters merge into the other channel: this is case Law. A new idea occurs to a Judge in trying a case. He embodies it in a decision. It is reported, cited, consecrated by time and repetition, and so becomes an accepted part of our jurisprudence. Case Law is, essentially, Judge-made law. In view, then, of the importance of case Law, it would naturally be supposed that the duty of law-reporting would have long since become the subject of official supervision. But this is not the case. The business is left entirely to private enterprise. And this is all the more surprising because our Judges do not follow the practice which obtains in foreign Courts of Law, where the Bench causes to be handed to parties to a suit copies of the judgment, on payment of a small sum. But whether the litigants pay the fee or not, the judgment is recorded in final and authoritative form, entirely independent of newspaper and Law-book reports, the latter not being available for months.

The work of the Law reporter is extremely important having regard to its effect on future judgments. The fact that private enterprise is entrusted with Law-making in miniature is assuredly a most singular anomaly. It is understood that Judges revise their decisions 'when they can spare the time.' But are all decisions carefully revised and are all corrections accurately embodied? In this connection *Truth's* allegations, previously mentioned, have a special significance. Assuming for a moment that they are accurate as regards the leading journal, does the failure extend also to the reports in volume form? We commend the query to those whom it concerns, but we do not feel at all confident that it concerns anyone.

Never, surely, are haphazard conditions more utterly reprehensible than in matters of Law. The most critically essential of all our standards of measurement should have the quality of precision. We submit all others to the most meticulous verification. But in this scientific age, half our Law is exposed to insidious alterations, which practically preclude standardizing or any substantial approach to it. Accretion at one point, corrosion at another, continued through considerable periods, may produce the most unexpected results, as we have seen. Here the carelessness of the Law reporter is by no means a negligible quantity; but there is a far more serious danger in the artful nibbling of the lawyer in furthering professional interest. It must not be forgotten that a grave situation arises when the guardians of what should be our legal standards; our rules of action,

in Bentham's phrase, are directly concerned in fostering litigation. 'A law may be bad,' said Lord Brougham, 'because it may bear the plain mark of sinister interests, and those not only of lawyers, called, on this subject, by Cromwell "the sons of Zeruiah."'

This is the place to point out that the mark of sinister interest may be as plainly visible in ruthless opposition to urgently needed enactments as in clandestine manipulation of existing laws. It is a mark of sinister interest on the part of the great majority of the legal profession, both in this country and in America, to declare in and out of season that any worthy scheme of codification is impossible. That the purveyors of all commodities, whether Law or lollipops, should desire to keep weights, measures, and values in a state of confusion and uncertainty is intelligible enough; but that the customers should manifest equal indifference passes all understanding. Moreover, when we consider the universal satisfaction expressed by our neighbours with the practical working of codification, the persistent denial of such a boon is a measure of the arrogance of our Brahminism and of its profound belief in the limitless gullibility of the British public.

Not only does this question of codification touch our material interests at a thousand points, it concerns our national credit. Foreign critics maintain that we are wedded to the study of cases, small points of Law, because we are incapable of rising to the grasp of broad principles. That is to say, the race that produced Newton and Darwin

is accused of incapacity for great generalizations ! To throw the blame on caste prejudice and vested interest amounts to a confession that we are a lawyer-ridden people. General acceptance of the epoch-making hypothesis of Newton and Darwin was only possible when we had emancipated ourselves from the shackles of sacerdotalism. Not until we shake ourselves free from the trammels of Legalism—a still more insidious enemy—can Anglo-Saxon communities come into line with the modern spirit and reject empiricism in Law, with the tangle of uncertainties which it connotes.

Observe that all quibbles, nice points, moots, doubtful cases are expressed in terms of *£ s. d.* The expense of a search for cases has increased materially with the continual additions to our legal libraries. The tendency is still upward, and so the tariff wall round Justice is raised with each revolving year.

Our Legalist system is based upon three main supports: these are, the solidarity of Bar and Bench, trial by jury, and the Common Law. Now the greatest of these is the Common Law. That, at all events, is the opinion of the Bar. Of this, abundant evidence is forthcoming in the dithyrambic extravagance of the special pleader in support of his speciality or in denouncing codification. Early in the last quarter of last century there was a strong movement in favour of codification, both in this country and in the United States. The word went forth from the headquarters of Legalism that there was mischief afoot; ancient privileges were threatened. Forthwith a strong contingent



of sophists was mobilized in both countries. A friendly rivalry was immediately noticeable in a chorus of eulogy of Common Law and the most lurid reprobation of codes. This affords further evidence of the common vested interest of the legal profession in both hemispheres. We append two specimens published on different sides of the Atlantic. Internal evidence points to a common origin :

The written and unwritten Law of England [says one be-praiser of the past] is a great and noble system. Whatever its errors and shortcomings, it has, during more than six centuries, secured the prosperity and preserved the liberties of the land, while almost the very name of freedom was extinguished in those countries of continental Europe which adopted its great rival, the Civil Code.

We saw what the unwritten Law did to protect the widow and the orphan. That it secured our prosperity and preserved our liberty is on a par with the statement that Tenterden steeple is the cause of Goodwin Sands. Observe, too, the recurrence of the singular delusion of a pampered caste that their prosperity is synonymous with that of the State. Their egoism is equal to that of Louis XIV :

The Laws of England [continues this Boanerges of the Bar] do not indeed flash across the historical horizon with the meteoric splendour of the Codes of Justinian,<sup>1</sup> Frederick, or Napoleon, but they have shone for ages with the steadier, more useful light of a planet. . . .

<sup>1</sup> 'The vain titles of the victories of Justinian have crumbled into dust, but the name of the legislator is inscribed in a fair and everlasting monument.'—*Gibbon*.

Let us not be misled by crude theories based on axioms taken up without examination, or fancied analogies from the legislation of France when recovering from a Revolution of unexampled magnitude and horror ; of Rome when tottering to her fall, or of Constantinople when sunk in an abyss of slavery, superstition and corruption.

The cue was to cast discredit on the three great codes of the world, and treat them as a product of the morbid pathology of nations. Another fugleman follows similar lines, and although he attempts less lofty flights he is more incautious than the high-flier, as we shall see :

Codes [he assures us] are devices found essential to the dominions of Emperors. . . . The pure and classic age of Roman Law was the period which embraces the time of the Republic and the earlier part of the Empire. . . . Code in the modern legal sense was first adopted in Prussia. The measure was initiated in 1751 by Frederick the Great. The result is a complete failure. . . . As regards India, the utter confusion existing even in respect to native Law, without mentioning the competition between that and British Law, rendered a resort to statutory enactments a necessity.

The last sentence proves too much. As regards the German Code, a reliable witness will describe it for us presently. Bentham will supply a corrective to the tales of earthquake and eclipse. He asks the pertinent question :

Where codification has taken place, are men satisfied or dissatisfied with it ? To the public a code will serve as a key, an instrument of interpretation for the solution of all such difficulties and doubts as might otherwise have place in regard to the import of the terms employed. . . .

Under such a system, on turning to the appropriate part the information is yours, all plain reading, no guess work, no argumentation, your rule of action lies before you. Thus it might be. Thus it ought to be.

Bentham's eulogy of an ideal code is amply justified by the experience of France and Germany. The late Professor Maitland wrote of the latter country, referring more particularly to the codes which came into force in 1901 :

By these the German people have brought their law up to date and are facing modern times with modern ideas, modern machinery.

We are still facing the future with medieval methods, medieval ideas and medieval weapons. The enemies of codification in 1878 did not trust entirely to the alarums and excursions of the caricaturists into Roman and French history. They found means to cast ridicule upon the scheme by the introduction of such Draconian proposals as the following :

When two or three persons together between sunset and sunrise enter unlawfully on any land for the purpose of taking game, the penalty was to be fourteen years penal servitude. . . . If a woman of 21, being an heiress, be taken away from the care of her family, even to be legally married, the penalty was to be fourteen years penal servitude. . . . Adultery committed with a Queen Consort or with the wife of the heir-apparent of a King or Queen was to be punishable with death.

Under such laws as these it would be difficult to say whose position was the more uneviable, that of Lothario, or Joseph, in the temporary *entourage* of a crowned Gulbeyaz. Both vice and

virtue would have reason to tremble 'twixt axe and crown. This Bill had other amusing features. Section 32 would have enacted that: "An act done with intent to commit an offence, the commission of which in the manner proposed was, in fact, impossible, is not an attempt to commit that offence." A satirist of the period, over the signature 'Habitual Criminal' pleaded—

that those who follow the ancient callings of murderer and thief—callings which began with human nature and the first dawn of property—are entitled to as much consideration as those members of the community whose pride it is to live inconveniently long, or to possess umbrellas and watch chains, though they do not deserve them.

Years after this date, according to Mr. *Punch*, Bill Sikes insisted on having a voice 'in making the laws as we suffers by.' Our critic continues :

Sir James FitzJames Stephen, fresh from contact with the immemorial and venerable crime of India, seems in the Bill with which he has furnished the Attorney-General to allow the force of the above suggestion. It is indeed refreshing to feel that when he treats of insanity he does so from the point of view of the lunatic ; that allowance is made for those who desire to take life as well as those who would keep it ; and that eccentricity, which has long been supreme in Art, is now to have its day in morals also. Belonging as I do to a class proud of having furnished to the scaffolds of our country as many victims as the most respectable house among our old nobility, I welcome the evidence of enlightenment and I rejoice greatly when I read Section 32 of the Criminal Code<sup>1</sup> Bill. Many a

<sup>1</sup> See footnote to Chapter VI. Justice Grantham denounced the tactics which defeated the Criminal Code.

time, standing in my place at the Assizes, have I raised the contention. Always has the Judge overruled it. My father died in a convict prison having been sentenced to penal servitude for life on a charge of attempting to murder. He had fired a pistol at the head of a policeman, but uselessly ; for the man, being a Superintendent, had the skull of an elephant. The bullet was spoiled, but the policeman lives. My father, who was frankness itself, avowed his intent 'to commit,' and regretted that the commission in the manner proposed was impossible, owing, as he pointed out, to the abnormal and improper thickness of his adversary's skull. It was a vain contention. 'If the bone had been thinner, you would now be a murderer' said the Judge. 'Do not let us argue on a hypothesis,' said my father. 'Observe, rather, the facts. The bone was too strong for my bullet, but this is not my fault, and therefore you should not condemn me for it.' Said the Judge, 'This is terrible impudence. Does Sir FitzJames Stephen mean it to be the Law?' In the meantime, I mourn the loss of the best of parents.

When ridicule had done its work, which was probably more effective than foolish vapourings about the connection of codes with carnage in French history, Lord Chief Justice Cockburn gave the measure its finishing stroke. While professing himself in favour of the codification of the Common Law, he declared that this particular scheme, retaining all the unwritten Law which it did not do away with, would only serve to make confusion worse confounded. So ended one of the most singular, one of the most discreditable incidents in the legal history of this country. It succeeded in postponing codification indefinitely. A perusal of the tissue of medievalisms, the outrages

on common sense, leaves no doubt that there were traitors in the camp. They contrived to put off the evil day. Codification, except in a fragmentary form, is held by an interested professional opposition to be entirely unsuitable to this country, but the Royal message, already cited, gives strong support to its introduction to India. The time for systematic codification is overdue; its beneficent working, its efficiency, its cheapness are the nightmare of our Brahmins. Hence the following example of turgid rhetoric :

The Common Law of England is not a compendium of mechanical rules written in fixed and indelible characters, but a living organism which has grown and moved in response to the larger and fuller development of the nation. The Common Law of England has been, still is, and will continue to be, both here and where English communities are found, at once the organ and the safeguard of English Justice and English Freedom.

This utterance<sup>1</sup> is characteristic of the advocate, but is it worthy of the Prime Minister of England ? The revolutionary in politics is the reactionary in Law. Applying the usual rule of interpretation, we arrive at the assured conviction that the Common Law of England is the principal asset of the Bar.

<sup>1</sup> Mr. Asquith at the Bar dinner in 1908.

For further notes on the subject of this chapter, see Appendix K.

NOTE.—(*Encyclopædia Britannica*, Article 'Code'). 'Codes modelled on the French Code have taken rather firm root in most of the countries of continental Europe and in other parts of the world as well, such as Latin America and several of the British Colonies. The Prussian Code was published by Frederick the Great in 1751. One of the objects of the

King was to destroy the power of the advocates whom he hoped to render useless. This code has been replaced by that of 1900.'

The ravages of Legalism are much less severe in our sister States than in India or America. The fact is accounted for, chiefly, by the absence of certain stimulating conditions referred to in the text. The extract cited above describes changes which are also a subsidiary factor. Some States have adopted codes, and in practically all of them the duties of barrister and solicitor are combined. These salutary innovations indicate a wholesome independence of the system imported from this country. There is an instructive reminiscence of that system in the popular name given to a variety of the *Calamus Australis*, which has uncommonly sharp little thorns, curved and pointing backwards. This is known as the 'lawyer palm' in Australia.

## CHAPTER XII

### SOME FREAKS OF COMMON LAW

‘ COMMUNIS ERROR FACIT JUS.

No Code to Britons gave a right,  
They reasoned wrong, then saw  
Their common error's regal might  
And called it Common Law.'

—*Mr. Justice Darling.*

A PRIMARY necessity in a commercial country is a definite, precise, and unmistakable understanding as to the form of words which constitutes an enforceable contract. After protection for life and property, this is a matter of paramount importance. It belongs to the domain of Common Law, which has been the object of extravagant encomiums from lawyers and unmeasured denunciation from critics. Our readers shall have an opportunity of judging which extreme is nearer the truth. Attention is called to this simple document :

I hereby agree to sell to Mr. George Dickinson the whole of the dwelling houses, garden grounds, stabling and outbuildings thereto belonging, situated at Croft, belonging to me, for the sum of £800, as witness my hand this tenth day of June, 1874.

£800

(Signed) JOHN DODDS.

P.S.—This offer to be left over until Friday, nine o'clock A.M. (the twelfth June), 1874.

(Signed) J. DODDS.



Dickinson naturally thought he had a firm offer from Dodds, open for two days. It is a characteristic feature of English Common Law that such a simple transaction may give rise to an interesting case. That is, interesting to the Law student and possibly ruinous to the parties concerned.

Notwithstanding this memorandum, Dodds sold the property on June 11 to another purchaser without notice to Dickinson. The latter gave notice to Dodds before nine o'clock on 12th June that he accepted the offer. Finding that the property was sold he then sued for specific performance of what he alleged to be a contract. It was held that the offer was not binding. Why? It is an admirable example of the devious ways of our Legalism. Lord Justice James stated in his judgment that the promise to keep the offer open could not be binding, and that at any moment before complete acceptance one party was as free as the other. He then goes on to say :—

It is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson 'Now I withdraw my offer.' I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were one at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not a continuing offer the acceptance comes to nothing.

According to a story of the *ben trovato*

order, Lord Palmerston once sought to impose upon Mr. Gladstone the task of explaining away the inconvenient wife of Don Pacifico. That vanishing trick would have been of easy accomplishment to the conjurer in psychology just cited. His casuistry would effectually dispose of ninety-nine business contracts out of a hundred. And yet we were told, only a few pages back, that the 'written and unwritten Law had secured the prosperity of the country during six hundred years !' With equal reason might a maker of pins maintain that his product had saved centuries of human life. How so ? Because people abstained as far as possible from swallowing it. Our prosperity has been achieved in spite of the unwritten Law, not on account of it. Referring to this case, Sir William Anson, a great authority, opines that—

the language used is at variance with the theory of communication of acceptances and revocation as settled by certain cases. In business there must be many offers which do not contemplate an immediate answer. A reasonable time is allowed during which the offer is continuing, and a mental revocation would not avail against an acceptance made within such a time.

We are now in the region of mental revocations—twin-brother to mental reservation—in discussing a simple business transaction ! The close kinship between Legalism and Sacerdotalism forces its recognition upon us at every point. Sir William cites a number of cases which contradict and overrule the judgment cited. He concludes :

*Dickinson v. Dodds* is no authority for the validity of an uncommunicated revocation. But it does raise a question which remains unanswered as to the source whence notice of revocation must come.

So that even when a piece of sheer unreason is overruled, it leaves a question unanswered which no one but the Tapirs and Tadpoles of Legalism would think of asking: thus fresh regions are added to the trackless waste of Common Law.

When Statute Law makes an incursion here, the confusion is complete. A single instance will suffice. Under section 4 of the Statute of Frauds there is this clause: 'No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person unless the agreement shall be in writing.' It follows that if two people enter a shop, and, when one buys something, the other says to the shopkeeper: 'If he does not pay you, I will,' in the absence of writing this promise is void by the Statute of Frauds. But now comes another subtlety. It is held that if the buyer's companion says to the seller: 'Let him have the goods, I will see you paid,' that promise does not come under the Statute of Frauds. It is an undertaking as for the speaker himself; he is the real buyer and the other acts as his servant. Every tradesman is supposed to know the Law. 'Caveat venditor' is a proverb he should never allow to grow musty.

Another freak of Common Law is its insistence

on 'consideration.' 'The doctrine of "consideration" is, in fact, peculiar to those jurisdictions where the Common Law of England is in force or is the foundation of the received law.' It is written for our instruction that 'consideration may be an act, a promise, or a forbearance.' Under the last-mentioned heading there have been some startling developments. In April 1908 a case which turned upon the interpretation of 'forbearance' was decided in the Court of Appeal. The majority held that escape from exposure in the Divorce Court might legally form part of a 'consideration.' The judgment is reported in *The Times* of April 14, 1908. The matter is of the utmost importance. The decision necessarily applies to wife as well as to husband: and so it is established that the husband's forbearance to the wife in not exposing her in the Divorce Court may form part of a valuable 'consideration.' Traffic in dishonour is thus accorded a certain measure of legal recognition. This is one of the developments of the profoundly immoral principle of 'consideration.' Observe, too, that just as in the perversion of the Law of inheritance, the first introduction of this pseudo-principle is involved in mystery. 'So silent,' remarks Sir William Anson, 'was the development of the doctrine as to the universal need of "consideration" for contracts not under seal and so marked was the absence of an express authority for the rule in its broad and simple application.' That is to say, it is another mischievous figment of Common

or Judge-made <sup>1</sup> Law without one iota of legislative sanction.

'How should lawyers not be fond of this brat of their own begetting?' asks Bentham. It is only fair to point out that our greatest lawyers have never concealed their objection to this legal interloper. In 1765 Lord Mansfield raised the question, whether there was any necessity for 'consideration' in the case of commercial contracts made in writing. He held that 'consideration' was only required as evidence of intention; and that where that evidence was supplied in any other way, the want of 'consideration' should not affect validity. This view was emphatically repudiated by the Legalists in the House of Lords soon afterwards. Their preference has always been for the introduction of new sources of litigation rather than for their removal. It is interesting to note that in contracts under seal a singular piece of ritual is introduced. An indispensable condition is that the parties should touch the seal; signing was at one time a secondary matter. One of the worst freaks of all declares that a contract is unenforceable and cannot be produced in Court if it is unstamped. Blind adherence to this 'principle' in the case of Bills of Exchange keeps our Law at continual variance with that of our neighbours. Continental jurists take the view that it would be fairer to impose a fine in the case of an apparent attempt to evade the provisions of the Stamp Act, than to

<sup>1</sup> 'Never forget that if you take your law from Judges and your religion from Bishops, you will find yourselves presently without law or religion.'—*George Bernard Shaw*.

inflict a heavy loss or perhaps absolute ruin on a trader for an omission which may be nothing more than an oversight on the part of an employé. Our policy is defended on the 'principle' that 'Courts of Law will not trouble themselves with the intentions of parties who have not couched their Agreements in the solemn *Form* to which the Law attaches legal consequences.' That is the true inwardness of Legalism: it is the cult of *Form*, and too often the stultification of Justice. But a glance under the surface of things will convince us that the cult of *Form* is not a genuine worship: it is an organized hypocrisy which opens the door to every kind of pettifogging artifice for increasing uncertainty, fostering litigation, and securing spoil. In this pursuit the callous<sup>1</sup> indifference to the interest of the public is nowhere more striking than in this matter of unintentional infringements of the Stamp Act. Not only in Bills of Exchange, but in all sorts of home transactions, the omission to stamp the least important of half a dozen documents connected with a claim leads to its being thrown out on the instant. Time may be of the essence of the contract; an option may be on the point of expiring when the untoward discovery is made; no matter. The Law is the Law. Irrespective of the soundness of his claim, the litigant is non-suited. He hurries to Somerset House if he is fortunate enough to possess a ten pound note. He pays the fine; gets the document stamped and applies for a

<sup>1</sup> 'Callous and full of a cruel apathy.'—*Father Tyrrrell*.  
For some freaks of Legalism, see Appendix L.

fresh hearing, which means fresh fees. The legal euphemism for this process is, that it has secured the prosperity of the country.

According to Sir Henry Maine: 'Technicality is the disease not of the old age, but of the infancy of Societies.' Our Law is necessarily technical because vested interests have kept it in the empirical stage. The question is, whether it has not already passed from first into second childhood, so unconscionably long has its infancy been.

## CHAPTER XIII

### THE SPECIAL PLEADER

‘The Common Law of England has been, still is, and will continue to be both here and wherever English communities are found, at once the organ and safeguard of English Justice and English Freedom.’—*Mr. Asquith, K.C., M.P.*

‘It was the Bench and Bar of England in the Inns of Court, in the Courts of Westminster Hall, and more lately in the Royal Courts of Justice that established those fundamental, those absolute principles that lie at the foundation of our common liberties.’—*Mr. Choate, of the United States Bar.*

‘If he were called upon he would be prepared to give instances proving that the most effective, the most vigilant, the most acute Judges would be found not among the youngest, but almost invariably among the oldest men.’—*Sir Rufus Isaacs, K.C., M.P.*

‘He differed *in toto* from the author of the paper as to the expediency of throwing open Chief Justiceships and memberships of Council to Civilian Judges. The opposition to that course would be too serious for any Government to face.’—*Sir Erle Richards, K.C., K.C.S.I.*

‘The duty of the advocate is to help <sup>1</sup> the Judge in ascertaining the truth.’—*Sir John Simon, K.C., M.P.*

APPLYING Mr. Balfour’s expression to our legal development as a nation, ‘we are babes in such matters,’ pleased with a feather, tickled with a straw. That condition explains but does not justify the ascendancy of the advocate; it also explains our delight in the performance of the special pleader. Special pleading is to advo-

<sup>1</sup> ‘Party writers, if not honest, are helpful, as the advocates aid the Judge; and they would not have done so well from the mere inspiration of disinterested veracity.’—*Lord Acton in ‘French Revolution.’*



cacy what foam is to water ; it throws up a froth, which disguises alike the quantity and the quality of the liquid. Under the stimulating breath of the artist, this froth expands into bubbles of singular beauty when seen in a suitable light. The lucrative art of bubble-blowing has been carried to great perfection among us. Five contemporary experts of great distinction contribute specimens for the leading of this chapter. We propose to treat these as an international competition. We invite our readers to consider them with all the respect that they deserve. The responsibility of awarding the palm devolves upon our readers. We shall be content to point out certain features that are common to all those efforts, and to remind the Judges of the rules that govern the game. They will be pleased to remember that, despite the unutterable solemnity of the performer, blowing bubbles is essentially an amusement for childhood's happy hour. We admire the skill shown in floating these airy nothings ; we encourage it with applause ; we reward it with gifts ; we laugh at its bold innovations in history, but we don't cavil at them. That would be as silly as entering a protest against the late Mr. Barnum's assertion that he possessed two heads of Washington, 'one as a boy, the other as a grown man.'

Our readers will not fail to note that great pictorial audacity is a characteristic of all legal bubbles. The flights occasionally achieved are positively sublime. Take our first specimen, for example—the order, by the way, is strictly alphabetical. This is the Common Law bubble.

Revolving slowly as it rises, we are presented with a series of beautiful cinema pictures ; and an entirely new aspect is given to well-known scenes. The Barons in a famous picture, who, calmly resolute, surround King John, have been replaced by lawyers in horsehair wigs. Poor King ! He will gladly sign anything. Then we see a procession of Judges who have helped to make the Common Law what it is. During the long vacation, these very Judges defeat the Spanish Armada. How funny ! Nothing but lawyers ! And as the bubble rises overhead, we see a long vista of little pictures ; lawyers are fighting in aeroplanes, grappling in the central blue, safeguarding our freedom, with the exception of number four : this is the only bubble that assumes the gift of prophecy.

Our second specimen is the Inns of Court bubble. The Inns known to us are shown one by one, with a number of others that have disappeared. In one series of pictures the benchers are receiving Royal personages, the Serjeants wearing the coif in the Presence. Then the benchers are bravely leading the members in resisting an attack from the misguided people who mistake friends for enemies. On a subsequent occasion another attack is successfully repulsed. Then all danger is past, and a series of small pictures depict charming scenes as the huge inflated sphere revolves and rises. The Inns are seen receiving the Royal Warrant, conferring on their members the exclusive right to plead. Another warrant follows, under which Judges are selected only from among members of the Inns. A third

messenger brings a request that the Inns will organize a Department of Justice for the protection of their members. A fourth Royal messenger brings a command that the Inns shall form a Ministry. Finally, a deputation arrives from the United States charged with the mission of expressing their country's gratitude to the Inns. Litigation increasing by leaps and bounds! The Bar triumphant everywhere! Fees, a record!

The fourth specimen is devoted entirely to the illustration of little-known facts in the life history of the Judge. He is seen to differ from all the rest of the sons of men inasmuch as his judicial abilities develop in proportion as his bodily infirmities increase. His appetite for work grows as his desire for food diminishes. One picture shows him provided with an ear-trumpet. Another depicts the Bar similarly equipped. The difficulty in communicating with the spectral critic of pure reason is finally solved by the association of a medium with the dispenser of Justice. Scores of fresh complications are introduced. Nearly every case finds its way to the House of Lords. 'Books' are made on important cases, and the last picture proves that the hall of the lost footsteps has become a serious rival to the betting ring or the Stock Exchange.

Our fourth specimen is not a whit behind the first in boldness of prophetic utterance. The picture represents a surging crowd surrounding the India Office. It is whispered that a cherished prerogative of the Bar is to be violated. A civilian Judge is to be appointed to a vacant Chief

Justiceship. Menacing hands threaten the permanent officials. Huge posters are exhibited bearing the words : ' This thing shall not be ! ' ' Three cheers for the Babus and the Bar ! ' .

Our last competitor is less ambitious than the others. His bubble picture depicts a Court of Law in the Palace of Justice, which is at the same time the Palace of Truth. There, it is useless to attempt deception with the Judge. It is an enchanted Palace, of which the characteristic feature is that the slightest approach to prevarication is apparent on the instant. But this Palace is situated in the planet Mars, not in London as our legal entertainer would have us believe.

The Law has bubbles as the water has, and these are some of them. They are one and all intended to safeguard the interest or proclaim the praise of the Bar. The puff oblique is followed by the puff direct. A common variant on this theme is fulsome flattery of the Bench and encomiums on English Justice. This puerile entertainment has satisfied us, or, at all events, helped to keep us quiet, with occasional outbreaks of impatience, for many generations. If we are not still too young to read our own recent history, or not too old to remember it, one wonders how we continue to make no sign when the time-honoured playthings that cajoled our predecessors are confidently expected to possess their ancient charm. It is natural that our Barnums of the Bar should feel confidence in the persistence of our national babyhood in regard to Law ; but interest, like anger, is often a bad councillor. It ignores the Time-spirit. It clings

to the forlorn hope of defending the Chinese wall, which a long succession of hypocritical egotists have built round our legal system. These spell-binders have assured us that insular conditions differed essentially from those of the Continent; that codification was out of the question. Intrigues in exalted quarters and lavish dust-throwing in the eyes of the public have once and again postponed the defeat of vested interest. It was Abraham Lincoln's conviction that artifices might mislead some of the people all the time, and all the people some of the time, but that nothing could deceive all the people all the time. His confidence was justified as regards the arguments advanced in support of negro slavery. That most pernicious form of vested interest was swept away. The fact is assuredly a powerful argument for confidence in the collective sanity of the people of England and America. If they will cease to regard the legal luminaries whom we have cited as public entertainers and consider them rather as public trustees, their utterances will assume an entirely different appearance. Nothing is more reprehensible than the conduct of a trustee who keeps his ward in ignorance and hoodwinks him for interested motives. That is precisely what the Legalists of the Monarchy and the Republic are doing at the present time. We anticipate the only possible defence. It is, that as long as toys, castles in Spain, and air balloons satisfy the ward, the date of his birth is insufficient proof of his intellectual development. The argument savours more of the wicked uncle than of

the conscientious tutor or trustee. But there is a certain cogency in its cynicism. A nation has the legal system it deserves. And self-interest is ready to whisper to cynicism, 'Every to-morrow will be as to-day.' It will not; so much may be safely affirmed. To-morrow will bring Legalism fresh triumphs or grievous disillusionment. If we have not already reached the point at which decay inevitably begins—which God forbid!—the principle of growth justifies us in cherishing the hope that the nation will presently demand an account of its legal stewards; and that they will not always contrive to balk investigation by those idle vapourings with which we have too long occupied the reader's attention.

NOTE.—Technically, 'special pleaders' were men 'who having kept the usual number of terms—that is to say, eaten the prescribed number of dinners in the Inn of Court to which they belonged—became qualified on payment of a fee of £12 to take out a Crown licence to plead under the Bar. This enabled them to do all things which a barrister could do that did not require to be transacted in Court.'

## CHAPTER XIV

### THE BLIGHT OF THE BAR

'Acceptance of a brief is undertaking a duty ; not entering into a contract.'—*A Principle of Law.*

**O** Egotism, thy name is Advocacy ! Accepting a brief is undertaking a duty which may involve the advocate's Fatherland in confusion<sup>1</sup> ; but, when it suits the advocate, acceptance of a brief is placed on a lower level than entering into a contract ! An unfortunate client has no redress whatsoever when a barrister throws up his brief, on Saturday morning, in a case which is to be called on Monday. The client may succeed in getting an adjournment, and so make a serious addition to his costs ; or he may lose his case, owing to a fresh counsel having had no time to master it. Or again, the barrister may not throw up his brief, but he may fail to put in an appearance. Yet again, he may appear and settle the case without consulting his client. Finally, he may settle it in direct opposition to his client's instructions. In neither case does the barrister incur the slightest legal liability with regard to his client. This is the best instance of a one-sided

<sup>1</sup> See Chapter II.

arrangement which has ever been forced upon a long-suffering public.

It is a good debating point that the barrister, on his side, cannot sue the client for his fee. There is little consolation for the client in this quibble ; the barrister takes care to be paid in advance. The inability to sue for fees is a fictitious disability, but it is advanced in support of placing the client under a very real disability. This is an admirable illustration of the receptivity of the legal mind to ideas new or old when legal interests are served by their adoption. The barrister's inability to sue dates back to the *lex Cincia*, passed two centuries before the Christian era and subsequently renewed. At the time of its passing into law, advocates had not been recognized by the State, consequently they had no legal claim for fees. Advocates are now our lords and masters. *Flectere si nequeo superos, Acheronta movebo*. If conscript father Cincius is accessible to Latin through Juha's bureau, imagine his surprise on being informed that his Act is invoked to-day by the once-despised class of advocates who have become supreme in the State, in order to inflict injustice on clients ! Imagine his astonishment on being informed, further, that this mighty Empire of over three hundred million inhabitants has, with few exceptions, advocates for judges. Having pondered over these portents, would the Roman sage be surprised to know that there is an impassable gulf between the Justice which the State prescribes and the counterfeit which the lawyers purvey : that, compared with neighbouring States



where lawyers are not in the ascendant, Law<sup>w</sup> is confused, dilatory, uncertain, and expensive?

An incident of more frequent occurrence than a barrister throwing up his brief is that his jackal descends upon the solicitor and makes a demand for increased fees, on the ground that the case presents features of exceptional difficulty. This is neither more nor less than a species of blackmail to which the solicitor must submit. The jackal receives a percentage of the increased fees as commission, and so another intermediary helps to raise the tariff wall round Legalism, for the time comes when Justice is unthinkable in this connection.

It is difficult to repress a feeling of poignant regret when we consider the indifferent opportunities presented to our students of Law compared with those enjoyed by the corresponding class among our neighbours across the North Sea.<sup>1</sup> Here there are a few splendid prizes with a preposterous number of blanks. What we have called the gamble of our Legalism as affecting the public is a still wilder gamble as affecting the profession itself. The jury system in civil cases is as prejudicial to the true interests of the profession—although pandering to the immediate interest of a few individuals—as it is to that of the public. When we read that a barrister, having won a case on a sheer technicality, has briefs pouring in and his fortune is made, that is merely a form of gambling without any reference to merit. And

<sup>1</sup> See statement referred to in Chapter III. about the Inns, resistance to the establishment of an Imperial School of Law. See also Dr. Gerland's criticisms under Appendix A.

long centuries of Legalism have produced a singular degree of cynicism which prevents us from realizing the fact that such successes, inasmuch as they are travesties of Justice, must react unfavourably on the community and on the profession concerned. One direct effect is that the exercise of the legal profession tends to become repugnant to young men of generous sentiments, and consequently some of the best raw materials of Judges are lost to the Bench. '

Indeed, few situations are more pathetic than that of a young man of high principle and keen sense of honour who chooses the profession of Law in the belief that he will participate in the highest of all duties of a citizen, the administration of Justice. He accepts the whole duty of the advocate with enthusiasm. It is 'to help the Judge in ascertaining the truth.' On any other hypothesis it seems to him that the Bar is a nefarious trade calling loudly for suppression in a well-ordered State. Abraham Lincoln loved the profession of Law for the opportunities it offered for settling disputes and preventing litigation. Imbued with this spirit, the acolyte is caught early in a great movement of machinery, which is no part of the mills of God, to judge by specimens of the flour. Disillusionment begins when he is expected, as a matter of course, to conceal material facts from the Judge in order to mislead him. That is perfectly permissible, he is told, notwithstanding the dictum that 'you must not tell lies to a Judge.' The prohibition only applies when the Judge asks a direct question; it does not exclude

constructive deception, otherwise there is an end of advocacy.

In despair at the shipwreck of his ideals, the youth is filled with astonishment at the toleration extended to practices which mask ignoble actions under a thin veneer of plausible phrases. Sheer self-seeking becomes sacred duty. This pretence our civilization accepts, notwithstanding the admonition of the sage and the flagellation of the satirist. Dr. Arnold expresses his horror of the profession of advocate as 'leading inevitably to moral perversion, involved in the indiscriminate defence of right and wrong and frequently the knowing suppression of the truth! Swift describes advocates as 'a society of men bred from their youth in the art of proving, by words multiplied for the purpose, that white is black and black is white according as they are paid.' Macaulay asks whether it be right that, 'not merely believing but knowing a statement to be true, the advocate should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of feature, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false.' Mr. Lecky says that

a master of advocacy will rarely confine himself to a calm, dispassionate statement of the facts and arguments of his side. He will inevitably use all his powers of rhetoric and persuasion to make the cause for which he holds a brief appear true, though he knows it to be false. He will affect a warmth which he does not feel and a conviction which he does not hold. He will skilfully avail himself

of any mistake or admission of his opponent, of any technical rule that can exclude damaging evidence—all the resources that legal subtlety and severe cross-examination can furnish to confuse dangerous issues to obscure or minimise inconvenient facts to discredit hostile witnesses. He will appeal to every prejudice that can help his cause. He will, for the time, so completely identify himself with it that he will make its success his supreme and all-absorbing object, and he will hardly fail to feel a thrill of triumph if by force of ingenious and eloquent pleadings he had saved the guilty from punishment or snatched a verdict in defiance of the evidence.

It is true that such considerations do not deter all men: far from it; they attract certain men. There are conjurers with conscience, who, like Tartuffe, readily find *accommodements avec le ciel*. The Bar is welcome to such recruits. They understand the true value of protestations which are intended for public consumption. They are not deceived. It is a fascinating game. There are magnificent prizes for the lucky ones. Even supposing that the majority of young men are of this weak moral fibre, which is not admitted, we have all the more need of the others. Why repel them? Our neighbours are wiser: they welcome them as the natural protectors of the public against the devious ways of the Bar and the unscrupulousness of advocacy. We exclude all men from the Bench who cannot accustom themselves to the atmosphere of the Bar. And what of those who succeed after a time in accommodating themselves to conditions which were at first utterly repugnant? Have we forgotten the dyer's hand? It is

most assuredly a topsy-turvy country where long years spent largely in thwarting the course of Justice are considered the most suitable training for its administration. Does it stand to reason that a conscience that has been frequently strained at the Bar to the utmost limit of its elasticity shall, on promotion to the Bench, resume its pristine rigidity? When the attention has necessarily been riveted on subtleties and refinements of every description in the service of the letter, is it not inevitable that a sensitive appreciation of the spirit of the Law has suffered in the process? To ask these questions is to answer them. Our legal history establishes the fact that slavish obedience to technicality becomes a settled habit. And in the domain of Law, as elsewhere, the force of habit can hardly be over-estimated. 'This is its characteristic *par excellence*, namely a capacity acquired by repetition of re-acting to a fraction of the original environment.'<sup>1</sup> Science thus lends the weight of her judgment to support the consensus of opinion among the highest authorities that the atmosphere of the Bar tends to sharpen the wits and blunt the conscience.

<sup>1</sup> The President of the British Association, Dublin, 1908.

## CHAPTER XV

### THE BLIGHT OF THE BAR—II. (A CASE IN POINT)

‘ Whose even thread the Fates spun round and full  
Out of their choicest and their finest wool.’

THESE lines are written of Bacon. It was unfortunate that the purpose which the poet attributes constructively to the kindly Fates was completely frustrated by the blight of the Bar.<sup>1</sup> That fact notwithstanding, the benchers of Gray’s Inn conceived the idea of celebrating Bacon’s connection with the Inn by a banquet. Accordingly the *élite* of the legal profession assembled on November 2, 1908, the 300th anniversary of the election of Francis Bacon as treasurer of the Inn. That the benchers should invite their friends to commemorate such an occasion does not invite criticism, even if the toast of the evening is not drunk in solemn silence. But the matter assumes a different aspect when the occasion is utilized to celebrate Bacon’s connection with Law rather than with Gray’s Inn; when a certain distinction is given to the occasion by the presence and speech of that most graceful and accomplished orator, the American Ambassador;

<sup>1</sup> ‘Bacon was a servile advocate that he might be a corrupt judge.’  
—Lord Macaulay.

when, finally, the chairman, a distinguished K.C., leaves no doubt as to the purpose of the celebration. It is 'that they might challenge the judgment of Englishmen upon the broad view as to the memory and service of Bacon.'

In the history of challenges there is none so gratuitous as this. If it is issued in respect of Bacon's services to scientific investigation, there are more appropriate places than Gray's Inn for its production: if in respect of Bacon's association with Law, it comes with a singularly bad grace from a member of the Bar.

It may be safely assumed that Mr. Whitelaw Reid was keenly conscious of being confronted with a divided duty. He had come to praise Bacon, but at the same time he would probably have preferred to bury the legal side of his career in the waters of oblivion. This sentence is significant. 'If the whole connection of Bacon with the legal profession were left out of sight, his name and his fame would stand before England and the world practically the same as to-day.' That is tantamount to saying that Bacon's legal achievements have not enhanced his reputation. It is true, and it is as much of the truth as the guest of the evening could be expected to tell in the circumstances.

'Character,' according to Emerson, 'is greater than intellect.' Bacon had accommodated himself to the atmosphere of the Bar. According to him, 'the best composition and temperature [*sic*] is to have openness in fame and opinion: secrecy in habit: dissimulation in seasonable use and a

power to feign when there is no remedy.' Herein appears a certain weakness of moral fibre, to the composition of which advocacy is peculiarly pernicious.

Two circumstances served to make this strange celebration possible. The inherited and acquired acquisitiveness of the Bar, that incorrigible habit of setting up a claim to having secured the prosperity and safeguarded the liberties of the country, was superimposed on a national eccentricity. We are unconscious of any incongruity when a Famine Fund or a Fever Hospital is opened by a banquet. Conversation counts for so little in our scheme of entertainment, and feeding for so much, that social intercourse without dining is unthinkable among our middle class; while the Gargantuan feasts of our City Guilds serve the purpose of the suicide club. But all forms of this national eccentricity in organizing banquets pale before the banquet under consideration. What would be thought of Napoleon's admirers who should celebrate by a banquet their hero's connection with the Duc d'Enghien?

The alliance between France and Russia testifies to the disappearance of rancour over the sanguinary struggles of the past. The weapons of the combatants are rust; their bones are dust; the mellowing hand of Time has passed over scenes of carnage, and Nature 'has lavished the sweet oblivion of flowers.' New interests and new dangers have brought the two nations into a close compact; but we have not yet heard that an attempt has been made in France or Russia to



celebrate Napoleon's connection with Moscow by a banquet.

The Law was Bacon's Moscow. His association with it was not less disastrous to his reputation than was the Russian campaign to the Corsican's dream of universal empire. It was Bacon's misfortune that, instead of receiving a judicious training for the Bench, he was subjected to the atmosphere of the Bar. The record of the price which Bacon paid for his sojourn in that psychological climate is the most melancholy reading in the history of the intellectually great. It runs thus: 'I do plainly and ingenuously confess that I am guilty of corruption and do renounce all defence.' The pity of it!

We ask in astonishment how it occurred to the benchers of Gray's Inn in particular, or to lawyers in general, to pride themselves on an association which Bacon himself regarded with the most poignant regret. No man ever had less reason than he to re-echo the words of the sacred writer: 'One day in thy courts is better than a thousand.' Bacon's reflections assume a less enthusiastic form. These are his words: 'Knowing myself to be fitter to hold a book than to play a part, I have led my life in civil causes for which I was not very fit by nature and more unfit by preoccupation of my mind.'<sup>1</sup>

There is no appeal from this pathetic review

<sup>1</sup> 'If we are to accept Huxley as a safe guide the importance of Bacon's contribution to scientific investigation has been greatly exaggerated. After referring to the superstitious reverence for the "Baconian induction" Huxley (*Life and Letters*) calls attention to Bacon's ignorance of the progress of science up to his own time; and his inability to divine the importance of what he knew by hearsay to

of that portion of Bacon's life which he devoted to Law. Posterity has cause for equal *or* greater regret, not only for the sake of his reputation, not only for what he committed but for what he omitted. He adorned everything he touched except Law. There is therefore something supremely ludicrous in the notion that his legal experience can possibly be exploited for his own glorification or that of the Law. Such an attempt can only cover the one with ridicule and continually revive the memory of the other's disgrace. The Bar will be well advised if it ceases to proclaim the fact of Bacon's membership. Posterity may then forget that it played the part of Delilah to this giant in contributing to the destruction of his moral vision. The obtuseness of the Bar in this celebration has a certain kinship to the morbid vanity of a megalomaniac who dotes indifferently on scalps and trophies. But no matter how absurd the celebration seems at first glance, it is probably part of a consistent policy. Consider the attitude of the Bar in this country, where it opposes Law reform; consider its record in India, where its influence tends to foster disaffection; turn to the United States, and observe that the enormous power of the Bar is used to shield crime

be the work of Copernicus or Kepler or Galileo, of Gilbert his contemporary or of Galen, and winds up by quoting Ellis's severe judgment of Bacon in the general preface to the philosophic works in Spedding's classical edition (p. 38): "That his method is impracticable, cannot, I think be denied, if we reflect, not only that it never produced any result, but also that the process by which scientific truths have been established cannot be so presented as even to appear to be in accordance with it."

from its due punishment. Over against these indubitable facts, set the loud protestations of zeal for the service of the public in the present, the hosannahs sung to apocryphal services in the past, and it will be seen that Anglo-Saxon communities have as little reason for gratitude to the Bar as Bacon had. In both cases the Bar is boasting of the ravages itself has wrought. Its interests are diametrically opposed to those of the public. These interests are centred in all complexities, uncertainties, doubtful points, gambling chances, which promote litigation. Hence the necessity for the mask and the cloak, the solemn asseveration, the extravagant eulogy. In those histrionic efforts, the advocate is apt to forget his own adage. If the layman who is his own lawyer has a fool for his client, the condition of the advocate defending his own privileges is none the more gracious. As his own counsel, he is capable of the greatest prodigies of folly. He founds fallacious arguments on fictitious history. In subtlety he is a bad second to the Greek sophist, but six centuries of almost unbroken success give him a degree of foolhardy assurance which would be absolutely suicidal but for the inexhaustible credulity of the public.

In *The Times* of May 17, 1912, there is a report of a lecture by Sir John Macdonell on 'The Trial of Sir Walter Raleigh.' In this the following passage occurs: 'In the first part of the proceedings the name of Coke was soiled: the later proceedings were not to the credit of Bacon. The character of the man to some degree explains the virulence of the proceedings. In the plenitude of his many gifts, the most richly endowed of all the Elizabethans, a modern Alcibiades and more, he was also, by reason of his overweening pride and a certain instability of character, among the most unpopular of men.'

See Appendix L<sup>1</sup>.

## CHAPTER XVI

### THE STATUTE OF FRAUDS

‘So called because it has caused more frauds than it has prevented.’  
--*Old Proverb.*

OUR Legalism finds its greatest opportunities and its highest expression in that distracted region where the confusion of the Common Law relating to contracts is made worse confounded by a long series of qualifications and exceptions introduced by the Statute of Frauds. This piece of legislation was passed in the reign of Charles II. It was an attempt to provide a remedy for a state of things in which fraud and perjury were rife. The evidence of parties to a suit was then inadmissible. It is interesting to note that the old rule obtains in Jersey to this day, and that the evidence of near relatives of the parties is also barred. The conflict of testimony under those conditions was such that it became imperative to insist upon documentary evidence ; that was the chief purpose of the famous statute. But while aiming at a laudable object, the result was singularly unfortunate. It was open to the objection which Lord Chief Justice Cockburn raised against the bastard scheme of codification in 1878. It increased the confusion inasmuch as it retained the Common Law side by

side with the code which was supposed to replace it.

Similarly the Statute of Frauds and the Common Law form a species of dual jurisdiction. At certain points they overlap, and so there are many debateable cases which have never been satisfactorily defined by the authorities. But our interest is with the incomparably larger number, which are traps and pitfalls for the layman, although there is a fairly clear distinction to the eye of the expert. The following examples will illustrate the point :—

Under the sections relating to the creation or assignment of interests in land, it is sometimes difficult to determine whether a contract is or is not concerned with that interest. For instance, growing crops produced by cultivation are distinguished from the natural produce of the soil, such as growing grass or fruit. An agreement for the sale of the former is in no case concerning an interest in land ; it is therefore governed by the provisions of the Common Law. In the latter case, that dealing with grass or fruit, a contract comes under the Statute of Frauds. Witnesses to such a contract are of no account ; there must be documentary evidence. Now observe how such refinements open the door to sharp practice. An unscrupulous man enters into a contract to purchase grass or fruit, if the vendor is content with a verbal agreement before witnesses ; the knowing one has what is called ‘ a soft thing.’ He takes care that it shall be a time bargain for a date some months ahead. If the crop turns out

well on favourable weather, he closes his bargain at a profit. If he is confronted with a loss, he repudiates the contract, which is legally void under the Statute of Frauds !

Let us take another point. A contract for removal of fixtures does not concern an interest in land : it is under the Common Law. But a contract for the purchase of fixtures does concern an interest in land and so comes under the Statute of Frauds ! Further, all agreements which are not to be executed within a year from the date of the contract come under the statute. There are the following qualifications :—

The upshot of the decided cases turning on this Contract is that the parties must clearly contemplate liabilities on both sides extending beyond a year. Contracts which may be performed within the year on one side, though not on the other, and Contracts which may be performed within the year, though in fact they are not so performed, are not within the Statute. On the other hand, a Contract not to be performed within the year is not taken out of the statute by the existence of a condition subsequent, which might make it defeasible within the year.

These examples will give the reader an idea of the cactus hedge of fine points which cluster round the twenty-four clauses into which the five sections of the Statute are subdivided. ‘Everyone is supposed to know the Law.’ It is nothing less than astounding that we go on repeating these catchwords without a thought of their transparent falsity. This Byzantinism in essentials is anything but a healthy symptom. How can the layman be expected to acquaint himself with such

a tangle of hair-splitting refinements in which lawyers themselves are constantly at fault. For it must be remembered that it is not only the layman who blunders among these fine points of dual jurisdiction. He pays dearly not only for his own mistakes, but for those of his lawyer. Meanwhile the gigantic imposition is perpetuated from age to age because the interest of the legal caste is furthered by it. If our lawyers have not deliberately and of 'malice prepense' sown snares round the feet of the layman, as Bentham maintained, it is, at all events, indisputable that they offer a fierce resistance to their removal. Do our readers believe that by a mere coincidence an attempt was made in 1878 to imitate the course followed in the time of Charles II and form another dual jurisdiction? That is to say, yield to the demand for codification of the Common Law without really superseding it by the code. Leave code and Common Law side by side, one as a concession to popular clamour, the other as the mainstay of the Bar: their juxtaposition meaning that one would be constantly invoked against the other — a result which Lord Chief Justice Cockburn foresaw and had the honesty to denounce.

Here is another instance of the working of dual jurisdiction. In a case heard before the Court of Criminal Appeal during 1908, Lord Chief Justice Alverstone expressed a hope 'that he might live long enough to see a reform in criminal pleading.' The occasion of this pious aspiration was the escape of an offender under a Common

Law indictment for stealing lead which he had stripped from a house. Two confederates were laid by the heels for receiving the lead. They got their deserts, but the thief escaped. Why? Because it is a 'principle' in Law that lead-piping, which is part of the freehold of a house, cannot be the subject of an action at Common Law. And so the proved, proclaimed, convicted but acquitted thief swaggers out of court a free man. The Common Law, at its point of contact with the Larceny Act, was the organ and safeguard of his freedom. It is easy to imagine how this scene would tell when enacted by the hero before an audience of choice spirits. Nothing would be omitted: the discomfiture of the counsel for the Crown, the impotence of the Judge, the triumph of the actor, would serve to drive home the lesson that the Law is not necessarily a terror to evil-doers. Must we wait for another Dickens to pourtray the scene before we realize that such freaks of Legalism are sources of profound demoralization? We can well understand Mr. A. Maurice Low's assertion that 'the American people have been corrupted by their laws.'<sup>1</sup> Still more pernicious is the lesson of Legalism when it is taught in our Eastern dependency, where not only vulgar crime, but active sedition is indirectly encouraged and not infrequently evades punishment. The deplorable effect on the native mind may be estimated by the deep and increasing mistrust of our legal procedure that is entertained by the European residents.

<sup>1</sup> *The American People*, p. 352.



Whenever a fresh case of political assassination is reported, the first question the layman asks himself is, Will the assailant escape on a quibble? <sup>1</sup> It is greatly to be feared that the lawlessness of India, as it is produced by kindred causes, will steadily go from bad to worse like the lawlessness of the United States.

Another glaring failure of Justice occurred during 1909, under circumstances which have the appearance of being connected with the period of a year so prominently mentioned in the Statute of Frauds, but are really in quite a different category. There is a 'principle' in Law that unless the victim of an assault dies within a year and a day after infliction of the injury, the assailant cannot be convicted of manslaughter. That 'principle' was also the organ and safeguard of the freedom of a peculiarly dastardly ruffian. He had been sentenced to ten years' penal servitude for the manslaughter of his own child. She died in March 1908 of injuries inflicted by her father in December 1907. That was not disputed. It was proved that the prisoner had been sent to prison for a previous assault on the child in November 1906. Most unfortunately the Judge, in the first instance, forgot to tell the jury, in summing up, that the first assault could have had nothing to do with the death, and the fact that there had been a previous assault must be dismissed from their minds. The

<sup>1</sup> In reporting the Deccan murder by cable on December 26, 1909, the correspondent of *The Times* says: 'It is thought that the Government should place a heavy punitive police on the community and that, above all, none of the guilty should escape on legal technicalities.'

Court of Appeal thought that 'the jury might have been influenced by the crime of November 1906, and if so they had ignored the Law.'

We invite our readers to ponder over this acquittal. It is typical of the besetting sin of our Bench's enslavement to the letter, a legacy from the Bar. To those of our readers who have not reflected on the insidious nature of that environment it will seem inexplicable that learned, upright, and honourable men could have been induced to listen for a moment to the argument based upon the omission of the Judge in the first instance, and what the jury 'might have thought.' Instead of waving such puerile sophistries aside, the High Priests of Legalism were so much impressed by them that, in defiance of Justice, they actually let loose an assassin of a hideous type on a long-suffering community. We are not told whether any other child has the misfortune to call him father. If so, his record is a strong presumption that down the *via dolorosa* of their brief lives a second victim is now following the first.

On the vexed question of granting the Court of Criminal Appeal power to order a fresh trial,<sup>1</sup> there seems no reason for an absolute bar to such a course, considering the frequency of appeals in civil cases; at the same time we venture to assert that in the matter just mentioned ninety-nine laymen out of a hundred will agree that there was not the slightest necessity to try the case over again. The jury had the advantage of seeing the

<sup>1</sup> See Appendix L<sup>1</sup>.

accused ; they heard the evidence ; they knew they were doing substantial justice. Moreover, those of them who had small children of their own probably wished that the cowardly ruffian could have been put under lock and key for the term of his natural life. What guarantee have we that he is not prowling round a quiet suburb in order to kidnap an unfortunate child and gratify his mania for the infliction of pain ? Can we suppose that he will treat other people's children less cruelly than his own ?

We are well aware that such considerations have no weight with legal casuists. Their intellectual kindred, the rabbinical casuists, taught that the faithful should risk their lives rather than kill a noxious reptile on the Sabbath. Of the many varieties of this malady, juridical casuistry, or Legalism, is the worst. It is by far the most insidious, inasmuch as its freaks receive a remarkable stretch of toleration from our race. The explanation is that the legal profession has found that it subserved the promotion of litigation, and so they have forced Legalism upon us despite the fact that we have always shown the greatest impatience of theological casuistry. Law among us is in the position, to-day, corresponding to that of medicine before Harvey had discovered the circulation of the blood. Purely local appliances were then of supreme importance. Pseudo-principles held the field. Learned doctors wrangled about the fold of a bandage when the limb was threatened with gangrene.

But there is this grave difference between

medicine before Harvey and the Legalism of to-day. The old practitioners of medicine did their best according to their lights. Reactionaries there were among them, no doubt; but they were not the majority: these welcomed whatever made for progress. The proof is self-evident; we are not behind continental countries in medical knowledge or surgical skill. Our doctors do not attempt to raise a Chinese wall round their subject. They invite foreign doctors to medical congresses in this country. Our doctors attend foreign congresses. There is a constant interchange of views; medical knowledge is internationalized. There is practically no remnant of medievalism in medicine.

Compare this with our legal chaos. Our mandarins have contrived to make us believe that innovations (proved to be productive of great good among our neighbours) are unsuitable and unworkable in this country. When legal luminaries from over sea visit us, there is much dining and speech-making, but no useful interchange of views, because we are not progressive. We do not admit the need of change. We are hopelessly outdistanced; but rather than admit the fact and endeavour to make up for lost time we adopt the policy of the ostrich. We do not attempt to learn from our visitors. We assume airs of superiority and patronize them! In this way we make ourselves the laughing-stock of continental jurists. They have contributed enormously to the well-being of their countrymen by simplifying, expediting, and there-

fore cheapening legal processes. What have ours done? They have left us to struggle with the Statute of Frauds. We are still in the Stuart period. Our so-called principles are not rules of action which afford us guidance; they are mostly decoy lights which mislead us. When our lords and masters, the shining lights of Legalism, meet in a quiet place they cannot refrain from smiling, like the soothsayers in Cæsar's day, as they whisper, 'It will last our time, and after us the deluge.'

## CHAPTER XVII

### OUR TREATMENT OF ILLEGITIMATES

‘These have no heritable blood.’—*An old principle of Law.*

OUR law suffers from a perfect plethora of ‘principles,’ such as they are. The endeavour to preserve an appearance of consistency and proportion among them has produced the most calamitous results. By clandestine manipulation of the Common or Judge-made Law, it came about that children whose parents possessed only personal property were held to ‘have no disinheritable blood.’ That is to say, they could be disinherited by a parent’s whim without possibility of redress. They might come on the rates: no matter, a principle is a principle.

But some distinction had to be made between these children and others who were born out of wedlock. There are degrees in misfortune: and so the illegitimates had to be graded downward. The doctrinaire mind was equal to the occasion. A formula was found which answered all purposes. It delighted the casuist. The label for illegitimates bore the words ‘No heritable blood.’ The casuist rolled the words as a sweet morsel under his tongue. The formula had the advantage of keeping the two categories well apart. Not only was separation secured, but two distinct grades were established.

Inhuman treatment was meted out to both, but in different degrees. To your true doctrinaire (typified by Torquemada or Robespierre) the inhumanity of a principle is the last thing to be considered. Learned, upright and honourable, he will outrage reason for a verbal quibble, let the guilty go free, or shut the gates of mercy on untold generations of children in order to enforce a fantastic distinction.

Stern adherence to the principle that illegitimates had no heritable blood stamped them as legal outcasts—a stigma that has never been removed. Not satisfied with this measure of severity, casuists were found to maintain that illegitimacy was a bar to natural affection on the part of the parents. A legal principle was thus elevated into a physical doctrine which was equally cruel and false. Illegitimates have their share of whatever virtue, vice, talent or taint their ancestry have possessed or suffered. A supreme infliction of severity was still possible, and it was not spared these unfortunate outcasts. It was the affirmation of yet another principle for their undoing that the subsequent marriage of parents does not legitimate. This exhibition of unparalleled harshness places England in a minority of one among all civilized communities in Christendom or Islam. Even Scotland, the home of Calvinism, is not left to keep us in countenance. This is a singular commentary on our vaunted equality before the Law—a special Act of Parliament legitimates children on the subsequent marriage of parents. We specially reserve for the rich and

sell at a huge price what other communities, including the Scotch, extend as a right to rich and poor alike. This is a record in baseness, but it is perfectly consistent with the policy of Legalism all along the line. That policy is to establish a traffic in justice and make it an article of sale. Does our Law alone among the laws of the nations maintain the old disability in order that money may be extracted from an occasional rich illegitimate for carrying through an Act of Parliament? Are there reasons of a more plausible character for our extraordinary attitude? If so, our legal champions should tell us what they are. We have had samples of the special pleader's resourcefulness. If he is reduced to silence, the case must indeed be desperate. As a matter of fact it is incapable of defence. We punish the innocent for the guilty. We create a class of outcasts in whose breasts the monstrous injustice of their treatment rankles from youth to age. They are modern Ishmaelites: one of the cankers of the social organism. Their fathers can be compelled to contribute a trifle to their support during their tender years, but without incurring any further legal responsibility whatsoever. They may die possessed of large means, while their children come on the parish. We are all more or less responsible for the continuance of this outrageous injustice. Passivity here is complicity. We stand condemned for having permitted the public conscience to become debauched by long repudiation of natural rights.

History has no more striking illustration of the



danger of establishing tribunals and failing to provide them with codes. Judges thus become a law unto themselves. In this case they used that convenient instrument, the Common Law, 'a rule of wax,' to subserve certain exigencies of possessors of land. The thin end of the wedge was permission to alienate their personal property. Charity suggests that those who connived at this course had no conception of the developments to which it afterwards led. The most tragic of these is the appalling mortality among illegitimates. The figures indicate a veritable massacre of the innocents at a time when the air is full of lamentations over a falling birth-rate. The following passage is from an appeal by Mr. Guilford E. Lewis. It appeared in the Press some little time ago. The writer says—

An official inquiry would, I am sure, reveal a state of things that the public would refuse to tolerate for an instant. And it is such an inquiry by a Select Committee of the House of Commons, or even by a Royal Commission, that I ask the entire British Press and public to support by every means in their power, so that the blot that rests upon us as a nation may be removed without one moment's avoidable delay ; so that we may be placed on a level with our neighbours.

Let us see how the Law stands among them. In France, as in Scotland, the legal stigma of illegitimacy is removed by the subsequent marriage of the parents. Before 1896 the Law in France provided that an illegitimate child, if acknowledged by either parent, should have a third of what

would have been its portion but for the bar sinister. By a recent Law this share is now the half of what would accrue to a legitimate child; two-thirds, if no brothers or sisters are born in wedlock; and the parental fortune falls to the illegitimate in case of no direct descendants remaining. A subsequent marriage also legitimates in other continental countries. It was held some years ago by the Court of Appeal in England that under the will of an Englishman domiciled in Holland, leaving personal property to children legitimated by a subsequent marriage, such children 'could take' under the law of Holland, but not under the Law of England. Our commentator adds: 'Such children could not, however, have succeeded simply under that designation to real property devised by will.' The same authority informs us that in many States of the American Union the harshness of the English Law has been greatly mitigated. In Louisiana, for example, natural children, if duly acknowledged, may inherit both from father and mother in the absence of lawful issue.

Under Mahommedan law the acknowledged fact of fatherhood alone suffices to confer certain inalienable rights upon the child. Consequently one of our most pathetic groups of social outcasts has no existence in Islam. Are we surprised that our Mahommedan subjects put us to the blush by pointing out that while we boast, not without reason, of being worthy successors of the Romans at their best period, *parcere subjectis et debellare superbos*, yet we tolerate conditions in our

midst which go far to justify this retort to our animadversions on non-Christian communities :—

‘ Slaves of gold whose sordid dealings  
Tarnish all your boasted powers !  
Prove that ye have human feelings  
Ere ye proudly question ours ’

Unlike the process by which the alienation of personal property from legitimate children was effected, the abolition of legitimation by subsequent matrimony was accomplished by statutory enactment. The bishops opposed the change, but were overborne. The statute takes note of their objections, but overrules them in this phrase of ill-omen: *Volumus : leges Angliæ mutari*. The Church in this instance was less bigoted and illiberal than the State. A disastrous step was taken: the Laws of England were altered. It was deemed necessary to establish a wholly unjust and artificial set of distinctions in the interest of the owners of land, which was held to be ‘ a species of sacramental tie in all social relations.’

Are we to continue to perpetrate cruel injustice under the dead hand of those misguided innovators ? Will the churches not move in a protest against this age-long conspiracy to stifle the call of the blood ? The command of their Founder is: ‘ Suffer little children to come to Me and forbid them not.’ Is it too much to expect that the right reverend prelates, the Archbishops of Canterbury and York, will bring in a short Bill to re-introduce legitimation by subsequent marriage ? Their Graces are both Scotsmen. In

their native country the old humane law has never been subverted. The legal stigma of illegitimacy is removed by the subsequent marriage of parents. May we not hope that his Eminence the Cardinal Archbishop of Westminster will give to this most worthy object the weight of his authority and influence? To do so would be perfectly consistent with the benevolent policy of the Church in the past and with the ungrudging recognition extended by it to legitimation in other countries at the present day. Nor can we believe it possible that an appeal is vain when addressed to the Nonconformist conscience in this matter. Persons of all religious beliefs (and of none) are concerned in wiping out a national disgrace and taking the first step to vindicate demands for Justice, to which we have too long turned a deaf ear.

For detailed information of the measures taken on behalf of illegitimate children by the French Government, see Appendix M.

For new Swiss Code, see Appendix O.

## CHAPTER XVIII

### OUR CARE OF THE SPENDTHRIFT

‘The Law has no attitude to the spendthrift. It ignores him.’

**N**O two groups of human beings resemble each other more than children and spendthrifts. They have much in common, but the advantage is all on the side of the baby: the spendthrift is a babe in the hands of designing people from the cradle to the grave. There are two unpardonable sins under our present economic system. The first is to be poor; the second, to be ignorant of the value of money by temperament and incapable of learning it by experience. The latter vice necessarily involves the former, failing the purse of Fortunatus; so the spendthrift suffers from both, the truth being that he is in a great measure irresponsible for either. This fact the Law refuses to recognize. Consequently its attitude to a singularly helpless class may be disposed of like the subject of snakes in Iceland by the most concise of all encyclopædic writers: ‘There are no snakes in Iceland.’ ‘The Law has no attitude to the spendthrift. It ignores him.’

At first glance this indifference appears inexplicable; for if sheer helplessness has a claim to protection of Law, the spendthrift’s is such a case.

But there is more than his imbecile helplessness to be considered. During his brief career, a rich spendthrift attracts some of the most undesirable elements in the community—parasites of every description, who batten on his rapidly diminishing resources. His weakness makes him a centre of infection ; it is a danger to himself ; it is sustenance to noxious pests. There is therefore a double reason for the intervention of Law, and we shall see presently that other communities fully recognize its validity. Nor should we expect to find less attention devoted to the difficult problem of the spendthrift, if the main purpose of Law is to safeguard the welfare of the community. That is the ostensible purpose of Law everywhere. But, unfortunately, experience teaches us that there is a wide difference between theory and practice, between loud protestations and plain facts.

Wherever a certain class or profession acquires undue prominence, the harmonious balance between conflicting interests is disturbed and the disturbance is soon reflected in legislation, or the want of legislation, as the case may be. When the unduly prominent class happens to be the legal fraternity, as with us, we shall not be surprised to find that its interests occasionally prevail over those of the general public. Hence the popular phrase that ‘ the Law was made for lawyers.’ Our public has yet to realize the deep significance and the wide implications of this ancient saw. It is a compendium of our legal history since the Norman Conquest.

If we give a more precise definition to the con-

dition summarized in the proverb, we shall find that this general rule emerges: In a country where the legal profession has acquired a marked ascendancy, the legal system is strong at points where the interests of its practitioners coincide with those of the public; but where these respective interests diverge, the legal system is weak, inefficient, or has no attitude whatsoever.

The treatment of the spendthrift in this country is an apt illustration. The Law ignores him completely and is therefore inefficient. But when his meteoric career is hastening to its close, it is frequently found that the rapacity of one of the despoilers who surround him comes well within the clutches of the Law, and then we have a demonstration of its strength. There is a splendid opportunity at the trial for the display of great forensic gifts, and the Senior Bar is equal to the occasion. The plague spots of the social body are mercilessly scarified. The Press applauds the exemplary sentence. The public read, approve, but fail to perceive that they have just been furnished with ample justification of the proverb just cited.

Let them ask themselves what good purpose has been served by this expensive entertainment—an important trial. It has cost the public a large sum. It has consigned to prison a man who will live at the public charge for a year or two. The spendthrift victim benefits little; the fragment recovered from the wreck of his fortune disappears in lawyers' fees in spite of the fact that it was a

criminal trial. The sole beneficiaries throughout the entire episode are the members of the legal profession.

Communities that do not suffer from the incubus of legal ascendancy adopt a diametrically opposite policy.<sup>1</sup> They find that timely prevention is preferable to belated punishment. The spendthrift is saved from himself and from the potential pillagers. The Family Council, a beneficent institution borrowed from Roman law, is the means of his salvation. Its methods are simple, expeditious, inexpensive, and preclude any possibility of histrionic display or the garnering of fat fees. The Family Council is therefore taboo. Like codification, it is pronounced unsuitable for this country. We are assured that

The Family Council had its origin in a state of society whose essential note was entirely alien to our civilization. It was the tribal condition, a community wherein the unit was the family, not the individual as with us,

and much more of the same tenor. Notwithstanding the fact that our continental neighbours—almost without exception—whose civilization is far removed from the tribal condition, find the practical working of the Family Council highly beneficent, we are denied this boon. Among our miscellaneous borrowings from Rome, which comprise the most of our religion, much of our Law, and a full half of our language, the

<sup>1</sup> 'Arrêter l'injustice dans sa source, et par quelques lignes d'un règlement salulaire, prévenir les procès avec plus d'avantage pour le public et plus de véritable gloire pour le magistrat que s'il les jugeait ; voilà le digne objet de la suprême magistrature.—*D'Aguesseau*.



Family Council finds no place. 'The restraint of the Family Council would not be tolerated in our community for a moment,' declares a champion of privilege in the confident note of prophecy.

The true inwardness of the legal hostility to the Family Council is found in its simplicity. The *conseil de famille* is convoked by the *juge de paix* of the district, and he presides. The Council is composed of six members exclusive of the president, namely, three next of kin on the paternal and three on the maternal side. In default of these, their places may be filled by friends. The sittings are strictly private. Minutes are registered by the president at a cost of from ten to fifteen francs. Certain important transactions require a fee of fifty francs. Some require a formality called 'homologation' to render them valid. The affairs of minors and orphans are chiefly the subject of inquiry; but there is another class which comes under the tutelage of Family Councils—these are the incorrigibles and the spendthrifts. This is Miss Beetham-Edwards' summary of the subject, and there is no better authority. Similar testimony might be produced from almost any other continental country, even as far afield as Greece. Miss Edwards writes—

The Family Council is a domestic Court of Justice accessible alike to rich and poor at nominal cost, occupying itself with questions the most momentous as well as the most minute : outside the law, but by the law rendered

authoritative and binding. One object and one only is kept in view, namely, the protection of the weak. The law is stripped of its cumbersome machinery, and, above all, deprived of its mercenary spirit. Not a loophole is left for underhand dealing, speculation or chicanery. Simplicity itself, this system has been so nicely hedged round that interested motive finds no place in it, and the fortune of the minor or the incapacitated incurs little or no risk.

To the genuine lover of Justice this recital is a delight. Like an important scientific discovery, the Family Council met with an enthusiastic welcome everywhere, except in Anglo-Saxon countries. The exception is arresting in view of the intuitive love of the race for fair play and the homage paid to this sentiment in exalted quarters. But at this point we enter the region of nice distinctions. It is significant that pæans are sung in praise of 'English Justice,' not Justice without qualification. Why is this? There is no brand of science known as English, French or German. The appeal of science is universal: why not that of Justice? If Justice is truth in action, it has no more local colour than science. What would be thought of an English man of science who attempted to raise a Chinese wall round something which, for purposes of his own, he had labelled English science? Would he not be justly characterized as a rank impostor? Suppose, further, that he was aware of a discovery of proved and undoubted value to his fellow-men, but, again for purposes of his own, he defeated its purpose and prevented its application,

would he not be justly gibbeted as a public enemy ?•

Our Legalist smiles. His withers are unwrung. He 'hedges' against inferences from lofty sentiments by strict adherence to business principles. He purchases reprieve by the ever-ready quibble. His defence is that, whatever he may have said in his haste, he never really believed that Justice is anything but a commodity ; he consistently treated it as such, and sold it to the best advantage ; therefore the alleged analogy to science fails and the fanciful structure raised upon it falls to the ground. This is the truth at last. The Legal Trust enjoys the monopoly or purveying an article which it labels 'JUSTICE' in bold characters. There is no question of lofty ideals. The excellence of the commodity is extolled in the manner of the advertising quack. All brands of foreign manufacture are declared to be hopelessly inferior. There is no question of learning anything from beyond the sea : the most rigid system of Protection is enforced. The price of our much-vaunted commodity is constantly raised. It is inaccessible to the poor, the weak, the helpless who stand most in need of it. It is a luxury for the rich man, the large corporation, and its own kindred the Trusts. We could draw up an indictment of many counts against this age-long firm of cruel exploiters, but we are content to base a demand for the abolition of its monopoly on its treatment of two classes—children whom it robs, and spendthrifts at whose spoliation it connives by refusing to adopt measures of protection. We have already dealt

with the case of the children. With regard to them, 'the Law is callous and full of a cruel apathy.'

An identical description is true of its attitude to spendthrifts. This country more than any other calls aloud for the adoption of the Family Council. Our race is unrivalled both for making and spending money. No other country turns out such a rich crop of spendthrifts. Young men who have come, or are coming into money, are marked down, ambushed, and 'sniped' by parasites of two sorts, the dregs and the scum. Nor is there any country in the world where the shark and the tout of every description, the harpy and the siren of every class, find a fairer field and more freedom. Money-lenders urge the 'pigeon' to anticipate. Bookmakers' touts invite him to plunge on certainties. Stock Exchange half-commission men know of something which the Rothschilds are quietly buying. A small gang of expert and exceptionally gifted brigands have carried on this industry of plunder on a large scale for years past. They use worthless shares or valuable estates as counters. Their depredations amount in the aggregate to hundreds of thousands of pounds. It is a matter of common knowledge that undischarged bankrupts are living on plunder to the tune of thousands a year. If their destined prey are peculiarly susceptible to female blandishments, one decoy after another is thrown in their way. The duration of their fleeting financial lives becomes the subject of accurate forecast by the knowing ones who tumble over each other to divide the dwindling spoils.

Nor is there any stage at which these unfortunate victims of their own weakness and the Law's indifference can be compelled to call a halt as in continental countries. The downward course is persisted in, and not infrequently accelerated until there is nothing left but regrets. Because this is nominally a Free Trade country, does it follow that we must continue to give free play to every agency of financial destruction? Does it follow that the door should be banged, bolted, and barred against those measures of protection which the sages of the world have devised for the benefit of a peculiarly helpless class?

Just as in the case of the child, our Law fails utterly in affording protection to the spendthrift. He is left to the tender mercy of the spoilers. The Family Council is despised and rejected. And yet, strange to say, a near approach to it is reserved exclusively for the benefit of the barrister section of the legal caste. The decisions of the benchers of the Inns of Court are not subject to review in any Court of Justice. These benchers form a Domestic Tribunal, from which the only appeal lies to the Lord Chancellor and the Judges sitting as another Domestic Tribunal. Legal brethren, though less than kin, are more than kind to each other. This variant of the Family Council is for themselves alone.

If our readers desire to contrast legal apathy to the interests of the public with legal solicitude for the interests of its members, under Appendix C

will be found the report <sup>1</sup> of a case where an attempt was made—and succeeded in the first instance—to compel the defendant in an action to pay the plaintiff's solicitor's costs, on the ground that plaintiff and defendant had compromised and settled behind the back of the plaintiff's solicitor.

<sup>1</sup> The full report will be found in *The Times* of November 29, 1909. For some additional notes relevant to this chapter, see Appendix N.

## CHAPTER XIX

### OUR MARRIAGE LAWS

‘Children are the nation’s capital’ *John Ruskin.*

**I**F that statement is accepted, it follows that the Marriage Laws are the final criterion of capacity in our Law-makers. Warned by their treatment of children in establishing the laws relating to property, we shall not pitch our expectations unduly high. Nor is it long before caution is justified ; for we are confronted, at the outset, with a servile imitation of Roman Law. The ‘age of capacity’ in matrimony is fixed at 14 for the male and 12 for the female. A northern race blindly following a southern in defiance of physiology is only equalled in absurdity for refusing a lead from them, in a different province, at the bidding of prudence. Had we acted with a single eye to the national well-being, is it conceivable that we should have convicted ourselves of recalcitrancy and obsequiousness in the wrong places ? That describes our rejection of the Family Council and our adoption of the marriageable age.

But that is not all. We have positively relaxed the provision fixed for a race of more precocious development than our own. This is what an authority on the subject says :—

The consent of parents and guardians was formerly

essential to the validity of all marriages of minors by licence. But the statutes requiring such consent have been repealed; and it is now enacted that after the marriage has been actually solemnized, no evidence<sup>1</sup> shall be given to prove non-consent in any suit touching the validity of such marriage.

There are still worse horrors to come: the Law connives at a massacre of innocents. Another authority lays this down:—

The age of marriage has always been fixed at 14 for the male and 12 for the female; still, if they marry under that age but above the age of 7, that marriage is not void but voidable; either party on attaining years of marriage, that is 14 or 12, may disagree from and avoid the marriage by an extra-judicial act. It was decided that a woman of full age, who had married a boy of 12, and been bedded with him, was entitled to dower out of the husband's land on his dying soon after.

This is a legalized form of baby-farming—infanticide under forms of law. To this day the limit of age is an absolute farce. There is nothing to prevent girls from marrying under 12. Listen to what the Registrar-General says in his Report for 1906:—

Among the 540,076 persons who married in 1906, 2445 husbands and 2674 wives failed to make definite statements of age in the marriage register. Of the 50,942 minors who married, all but 14 stated their ages.

<sup>1</sup> Under the new Swiss Code of Civil Law which came into force on January 1, 1912, 'the marriageable age has been raised from 16 to 18 in the case of women and in the case of men from 18 to 20. But for all persons under the age of 21 the consent of parents or guardians is necessary. Even persons over 21 if deprived of their full rights as majors for drunkenness or extravagance, require the consent of their guardians before contracting marriage.'



There we have it: these young people are not required to give their ages, nor is there any attempt made to verify the statement when it is volunteered. Professor Karl Pearson has shown that the earlier members of a large family are more apt to inherit disease than those who are born later. It is a matter of astonishment to the layman that the 'age of capacity' was not raised in 1885, when the age of 'consent' was fixed at 15. But it is idle to talk of fixing new limits of age when we do not adhere to those already fixed, low as they are. The Law shows not the slightest regard for the interest of the child—that is, the interest of the race. It does not move a finger to control the wild gamble in human life. If our laws were drafted by our worst enemies, our condition could hardly be less gracious.

Another most undesirable concession, which the Law makes to physiological ignorance, is to permit the marriage of cousins. Exhaustive statistics have finally settled this question. Nor is the reason far to seek. The union of cousins necessarily emphasizes the defects of the stock by raising them to the second power. Let us then be advised by Mr. *Punch*, who, marching with the new century, has altered his advice to people about to marry from 'Don't'—one of the creeds that refuse and restrain—to the other extreme:—

Eugenic maids around you grew ;  
You might have had a dozen ?  
And yet you needs must go and woo,  
Oh, fool, a full first cousin.

If our race is to justify and retain its pride of place, it is to be hoped that the words 'holy matrimony' will cease to sound ironically as they do to-day when the clergyman, unconscious of the felony he is compounding, unites the immature, the decrepit, and the diseased. The rate at which we are producing degenerates<sup>1</sup> should arrest the attention of the most thoughtless. Thousands of children are brought into the world doomed to lead lives of disease and crime, owing to the ailments and vices of their parents. A State which cannot make up its mind to put a period to some of these horrors is manifestly decadent. It must be considered a continuance of the ill-luck that has haunted us for centuries past in the legal domain that the Law's indifference has found an apologist of distinction in an unexpected quarter. There is something quaint in the defence of a bad system that is hoary with age by the greatest follower of the Master, who declared that a truth ten years old was well on the way to become a lie. There is something specially piquant in a defence of the union of degenerates by the brilliant author of 'Man and Superman.' Mr. Shaw has recently preached the following doctrine :—

Bad breeding [he says] is indispensable to the weeding out of the human race. When the notion of heredity took hold of the scientific imagination, its devotees announced that it was a crime to marry the lunatic to the lunatic or the consumptive to the consumptive. But,

<sup>1</sup> Eugenic considerations are emphasized in view of the responsibility light-heartedly assumed by the State under the Insurance Act.

pray, are we to try to correct our diseased stocks by infecting our healthy stocks with them? Clearly the attraction which disease has for diseased people is beneficial to the race. If two really unhealthy people get married, they will as likely as not have a great number of children who will die before they reach maturity. This is a far more satisfactory arrangement than the tragedy of a union between a healthy and an unhealthy person.

We submit that Mr. Shaw's remedy, far from being indispensable, has no reasonable prospect of being efficacious; on the contrary, it would only exacerbate the disease. Mr. Shaw is right in supposing that degenerates will have large families. He falls into error at the next step. Even conceding the point—which he assumes too readily—that the degenerate brood will not reach maturity, the fact is notorious that they are busily engaged in propagating their species long before reaching maturity. We have just seen that a law fixing the marriageable age dangerously early for a northern race has been nibbled at, and nullified, in the interest of fee-snatchers until practically nothing of it is left. This is fatal to Mr. Shaw's prescription. Bad breeding under the present nullity of the Law, far from weeding out degenerates, will increase and multiply them. The weak with their morbid fertility and precocious sexual development will outbreed the strong, just as a debased coinage, given the protection of the Law, will drive out a sound currency. It must not be forgotten that evolution has not always, or necessarily, an upward tendency. The destruction of the empires of the past is conclusive evidence on the point.

Let us, then, discourage the marriage of the unfit<sup>1</sup> by every means at our disposal and raise the marriageable age by, at least, half a dozen years—say, to the minimum just adopted by the Swiss.<sup>2</sup> And, most important consideration of all, let us enforce the new limit when it is fixed by statute. Nothing is more pernicious than the corrosive process to which our Laws are subjected: the Law of inheritance is an instance, and others will be given. It sounds paradoxical, but it is really a platitude that, in the most law-abiding country in the world, no bulwark is safe from the insidious erosion of Legalism.

<sup>1</sup> 'As regarded practical interference there was, nevertheless, one perfectly clear line of action which they might be agreed to take—the segregation of the hopelessly unfit.'—*Mr. W. Bateson, F.R.S., in the Herbert Spencer Lecture at Oxford, February 27, on 'Biological Fact and the Structure of Society.'*

<sup>2</sup> For further details of the new Marriage Laws of Switzerland, and other information, see Appendix O.

## CHAPTER XX

### DIVORCE

‘There are many causes more fatal than misconduct to the great obligations of marriage.’—*W. E. Gladstone*.

THIS admission indicates a change from the medieval to the modern point of view. In a well-known passage Mr. Gladstone enumerated various causes such as disease, idiocy, crime involving punishment for life, which might be urged as valid reasons for divorce if the marriage bond was dissoluble. These and kindred reasons gain greatly in force if we consider divorce mainly in its bearing on the existence and welfare of children. The birth rate is falling,<sup>1</sup> one of the minor causes being that many thousands of our people are married only in name. Our Law still refuses to consider mental disease a sufficient ground for divorce. We read that in England and Wales, out of 124,000 persons certified as insane, over 48 per cent. are married ; so that some 60,000 persons, many of them young, are living in enforced celibacy. To these figures must be added a considerable number of people married to persons undergoing long terms of imprisonment.

<sup>1</sup> According to the quarterly return published on February 16, 1912, ‘the births registered in England and Wales in the fourth quarter of 1911 numbered 209,269 and were in the proportion of 23·0 annually per 1000 of the population.’

But a still more serious addition to the category of mock marriages is made under the compromise known as judicial separation. Misconduct being a sufficient ground for divorce if proved against the wife but not against the husband, a half measure has been adopted, and misconduct on the part of the husband now entitles the wife to a judicial separation. Of this resource wives are availing themselves to such an extent that, according to one authority, no fewer than 80,000 men and women have been condemned to celibacy since the Act came into force in 1895.

We observe that the opinions of Mr. Plowden, the highly respected magistrate, and of the late Sir George Lewis, the eminent solicitor, are cited in favour of divorces being pronounced by police magistrates. This course would have the double advantage of reducing expense and greatly diminishing the notoriety which is a most undesirable feature of the present time, and helps to swell 'the largest circulation' to the public detriment. The interest of the Bar, however, is not served by the proposed innovation, and much water will flow under the bridges before it is introduced. Milton is a witness in favour of facilitating divorce as opposed to the anti-social compromises which we have adopted. We retain the quaint orthography :—

It is a lesser breach of wedlock to part with wise and quiet consent betimes, than still to soile and profane that mystery of joy and union with a polluting sadness and perpetual distemper ; for it is not the outward continuance of marriage that keeps whole that covenant, but

whosoever does meet according to peace and love, whether in marriage or divorce, he it is that breaks marriage least ; it being so often without that love which only is the fulfilling of the commandment. Those whom either disproportion or deadness of spirit, or something distasteful, and avers in the immutable bent of nature renders unconjugall error may have joined ; but God never joined against the meaning of his own ordinance. And if he joined them not, there is no power above their consent to hinder them from unjoining.

Make the interest of the children the chief consideration, and the arguments of the great Puritan writer have redoubled force. An atmosphere of indifference, apathy, or strife, which makes life a burden to the parents, is extremely harmful to the children.

A recent writer, Mr. S. B. Chester, in 'The Anomalies of English Law,' gives his opinion, which is noteworthy as that of a barrister, on a point where the law, as at present administered, refuses divorce :—

The usual inability,<sup>1</sup> therefore [he writes], for an erring husband and an erring wife to legally dissolve their union, sows the seed of increasing injustice, which may and probably does extend to the punishment of persons who were not parties to the primary condition of adultery. A divorce should be obtainable, as of course, on the application of either party to a marriage, after one year's domiciliary separation, whether such separation is due to transgression or to the lesser evils of married life. Under such a condition of affairs, the community would be bound to

<sup>1</sup> In this case divorce in Scotland would be granted. An English authority declares, on the contrary, that 'no divorce is possible ; the couple must remain bound indissolubly in the bonds of mutual infidelity.'

benefit. The judicial separation of to-day is one of the most unsatisfactory phases of matrimonial law and practice. . . . Complicated procedure or difficulty in obtaining bare justice is entirely beyond the mark in this branch of jurisprudence.

Those of us whose tendency is to dwell on reforms that have been already introduced, rather than on those that are still urgent, will find consolation in a comparison of the Law in early Victorian times with that of to-day. It is also an illustration of the medieval backwardness of our Laws in all that most intimately concerns the welfare of the race. No further back than 1858, three suits were necessary to obtain divorce: an ecclesiastical, a civil, and a parliamentary suit. Mr. Justice Maule thus admonished a man brought before him on a charge of bigamy in 1845. The prisoner's wife had robbed him and run away with another man.

You should have brought an action [said the Judge] and obtained damages which the other side would probably have been unable to pay, while you would have had to pay your own costs amounting perhaps to a hundred or a hundred and fifty pounds.

You should then have gone to the Ecclesiastical Courts and obtained a divorce *mensa et thoro*. Then you should have proceeded to the House of Lords, where, having proved that these preliminaries have been complied with, you would have been enabled to marry again. The expense might have amounted to five or six hundred, or, perhaps, a thousand pounds. You say you are a poor man. But it is my duty to tell you that there is not one law for the rich and another for the poor.



The last sentence is a pointed insistence on one of the most cynical of our Byzantinisms, which have the characteristic of keeping the word of promise to the ear and breaking it to the hope. And yet it does not follow that the utterance was cynical in intention, as too many of our judicial jests too plainly are. The purpose may have been to call attention to a grave injustice to the poor offender. And here another puzzle suggests itself in regard to matters of to-day, equally with those of early Victorian times. It is this: In cases where the Law is admittedly unjust in the opinion of magistrate or Judge, is there not a moral obligation upon him, of undeniable force, to make representations in the proper quarter for its amendment? If it is urged that such action would be an encroachment on the sphere of the legislator, we submit that the objection does not apply in this case. It is the obvious duty of an official, in any well-managed service whatsoever, to call the attention of his head office to a rule which fails of its purpose, whether from laxity or severity. In no other way can a successful business be conducted. The analogy is complete.

Moreover, the objection comes with an ill grace from a Bench which has assumed throughout its history and, as we shall show, still assumes the function of the legislature more than any other. The attempt to find an excuse for the indifference of the Bench falls to the ground; but supposing there is no such indifference, no failure to point out glaring defects, what is to be thought of the apathy at headquarters? Have we anything which

can be appropriately designated headquarters in the legal world? The uncertainty of our law on matters appertaining to divorce would suggest that the question must be answered in the negative.

Take the case where a wife has been deserted by her husband: when she has obtained a separation order within two years from the time when the desertion commenced, does she thereby lose her right to plead such desertion under the Matrimonial Causes Act, 1887, and, after proof of misconduct, to obtain against her husband a decree of divorce?

The Appeal Court has answered the question unanimously in the affirmative and dismissed the appeal. On this the leading journal has the following comment:—

The indirect effect is to do what Parliament never intended to do: to turn what was meant to be remedial legislation into very much like the opposite, and to put one class of suitor, the poorest, at a disadvantage. The judgment of the Court of Appeal and the conflicting decisions that have been given on the point by Judges of first instance are instructive if only to show how imperfect may be the consideration of measures affecting the gravest interests of society. What would be thought of a solicitor who inserted in a deed words as ambiguous as those in the Act of 1895, which the Courts have been debating?

It is idle to ask what would be thought of a blundering solicitor: what concerns us is that when gross mistakes have been made by a solicitor, even in such instruments as wills,<sup>1</sup> the law shields him under an unworthy quibble and the innocent

<sup>1</sup> See Chapter III.

client is sacrificed. So in this case : the litigants and the poorest among them suffer for the grievous incapacity of a privileged class. We have the most expensive legal equipment in the world ; and yet an unambiguous section in an Act of Parliament is the exception rather than the rule. Bentham maintained that the ambiguity was of set purpose. We take the more charitable view with the greatest deference to that great authority : we think it is probably an inevitable consequence of using the jargon to which the legal caste is wedded, combined with the incorrigible tendency to prefer any interpretation but that of the obvious and natural meaning of words. It is not to be supposed that the late Lord St. Leonards intentionally introduced ambiguities into his will in order that lawyers might wrangle over his dispositions for years together and so fritter away a considerable portion of the estate. A more reasonable explanation than intentional ambiguity is that a long course of perverse ingenuity brings its own punishment and is mischievous in its effect on the agent. And so a Lord Chancellor of England became incapable of expressing his meaning in a language which served a working tinker of Bedford to write a masterpiece. But the legal caste need not be surprised if such incapacity, as *The Times* cites, bears a strong suspicion of dishonesty at first glance, seeing that more ambiguities mean more business to the profession which is the common parent of solicitors, barristers, Judges, and draughtsmen. But for this common bond of sympathy, if not of interest, is it conceivable

that the faulty drafting which is chronic, and occasionally defies the interpretation of '£30,000 worth of Judges,' would have so long escaped vigorous denunciation?

We shall now afford our readers an opportunity of contrasting our medieval indifference and modern uncertainty with the latest example of divorce legislation. We refer to the new Swiss Code which came into force with the year 1912. Our acknowledgments are due to *The Times*.

The new Code permits judicial separation as well as Divorce,<sup>1</sup> the Court deciding whether such separation shall be permanent or temporary. The grounds for divorce are precisely the same for both sexes; insanity if it has continued for three years and is certified as incurable being among them. In the case of a divorce granted on the ground of adultery the parties may be forbidden to marry for three years, while the Court may award the custody of children to whichever parent seems best fitted to bring them up. Should the Court disapprove of both parents, the children are boarded out. The party deprived of the custody of the children must still contribute to their maintenance and education in proportion to his means, but he also has the right to see the children under certain conditions fixed by the Court. The separation *a mensa et thoro* of English law is also recognized, when a wife finds her health or good name endangered by living with her husband. In such a case she may claim maintenance but cannot be compelled to cohabit with him.

Other continental countries have somewhat similar provisions, with the common characteristic of extreme solicitude for the welfare of children and freedom from ambiguity.

<sup>1</sup> See Appendix P.

## CHAPTER XXI

### THE LAW OF LIBEL

'We have actually attained, in our system of legal procedure, to the absurdity expressed in the well known fable where the magistrate solemnly warns the prisoner that "any statement you may make will be taken down, altered and used against you."'—*Lord Justice Fletcher Moulton.*

THE occasion of this pronouncement was the Lord Justice's minority judgment in a case where a provincial paper was mulcted in heavy damages, £1,750 to be precise, under the following circumstances: Discussing the merits of the late Artemus Ward as a provoker of laughter, the correspondent of the unlucky newspaper, on his way with a friend to a motor race at Dieppe, got the name 'Artemus' on the tip of his tongue. Thence to the point of his pen the transition was easy, and so the name slipped into the following paragraph:—

There is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing. Really, is it not surprising how certain of our fellow countrymen behave when they come abroad? Who would suppose by his goings on that he was a churchwarden at Peckham?

It is to be hoped that some adept in occult mysteries has told the original Artemus Ward of the dire results that followed such a trifling

cause as that silly little paragraph. His parents chose a somewhat eccentric Christian name, to which their son gave a wide publicity. For all we know, these other parents may have anticipated the wards in choosing the fateful name. In the case of the plaintiff it occurs not as a sole and only Christian name. It follows 'Thomas'—no doubter this particular Thomas as to the possibility of securing damages—a point which would seem to tell in the defendant's favour, but it did not. The plaintiff's full name is Mr. Thomas Artemus Jones. He is not a churchwarden at Peckham; nor does it appear that he is in the habit of smoking a long clay pipe—the 'churchwarden' of certain humble circles. On the contrary, Mr. Thomas Artemus Jones is a member of the Bar and resides in Wales. Neither correspondent nor editor had ever heard of him. Moreover, the plaintiff frankly admitted that he did not believe that he was pointed at in the offending paragraph; but he asserted that his friends did.

That fact, according to the dictum of Mr Justice Channell, proved the libel. His lordship had previously instructed a jury in the same sense—as if that settled the matter. His view was upheld, on appeal, by the Lord Chief Justice and Mr. Justice Farwell. In a minority judgment, Lord Justice Fletcher Moulton supposed a case to show how this interpretation of the Law will work :

The harmless domestic announcement [he said] that Mrs. A. B. has just had a baby might make a man liable to a grave charge of having accused a person of want of

chastity, if readers are at liberty, from the similarity of name, to apply it to a lady who is at the time a widow.

The House of Lords has upheld the majority judgment. We have a certain respect for any Law whatsoever that is 'in being.' At this moment few liberties are left to editor or author. Of the few that remain we do not know which will be the next to suffer shipwreck, like the name of the ill-fated vessel *Hannah*, in the 'chops of the Channel.' Lord Brampton is responsible for the expression, which did not refer to the respected bearer of the name who has just been mentioned.

The *Law Quarterly*, edited by Sir Frederick Pollock, D.C.L., LL.D., has the following editorial note in its issue of October, 1909 :-

Before the decision of the majority of the Court of Appeal in *Jones v. Hulton* we used to think that an action for defamation was not an action of trespass for interfering with the plaintiff's reputation considered as a kind of property which must not be infringed by the least accidental overstepping, but an action on the case for a wilful wrong. We also should have thought that if a paragraph were published to some such effect as this :

There is Dick Webster running hard with a constable after him and a crowd calling 'Stop thief !'

Who would suppose it was our good neighbour Richard Webster of Seven Dials who could never run at all !

No sane jury would believe it to be published of and concerning the Lord Chief Justice, even though three clerks from the offices of the Courts were to aver that they thought it referred to him.

The dissenting judgment of Fletcher Moulton, L.J., states the objections to the novel law (as it seems to us) laid down by his brethren, so fully and pointedly that we

shall not repeat them in any form of our own, but only commend the judgment to the best attention of our learned readers.

In the same number of the *Law Quarterly* a correspondent writes as follows :—

It would be difficult to find any logical reason for punishing with heavy damages a man whose conscience was absolutely void of offence. But logic is not always the basis of law, and if the judgment of the Court of Appeal is right, our English law of libel would be shown to stand on technicalities of the most oppressive kind. But on looking into the law it is difficult to find any legal ground for the decision in this case. The Lord Chief Justice would appear by implication to lay down a proposition which Lord Justice Farwell more boldly enunciated in plain language when he stated : ‘ A plaintiff need not of course be named in the libel. It is enough that he be sufficiently described, and for the purpose recourse may be had to innuendo.’ So long ago as 1599 it was laid down that ‘ an innuendo cannot make a person certain who was uncertain before,’ and it comes as a startling surprise to hear that statement of the law controverted.

We fear that the learned correspondent had not only a surprise, but a shock on learning that the House of Lords had confirmed the decision of the Court of Appeal. This case is chosen as an illustration of the incorrigible leaning of the Bench to oppressive, hairsplitting technicalities. Nor are these confined to the Law of libel as the correspondent just cited would appear to infer. It is the characteristic weakness of the barrister-Bench to introduce them everywhere. It may well be doubted whether the adoption of the



continental system of codification would finally eradicate the habit. It is woven into the web of our Legalism. Nothing short of a special training for the judiciary will effectually dispose of it.

The decision just cited has caused much trepidation in journalistic and literary circles, and various safeguards<sup>1</sup> have been adopted: in some cases comprehensive disclaimers have been published on the first page of a novel as a protection against the ingenuity of a skirmisher after damages. There can be no doubt that such decisions have a potent influence in stimulating libel actions, the increase of which is a significant feature in our contemporary legal history, coinciding as it does with a marked diminution of cases involving serious interests. It is manifest that the chances Legalism offers to the litigant of winning on a whimsicality are proving more and more attractive to a new type of speculator.

A London paper had to fight a libel action recently. This was *Flanders v. Forrester*, before the Lord Chief Justice and a special jury. The case is reported in *The Times* of January 31, 1912. The defendant denied that the words complained of, which appeared in the *Pall Mall Gazette*, applied to the plaintiff, and said that the person referred to by them was a purely imaginary one, and was so understood by those reading them. In this case the offending article was headed 'A Sad Affair,' and contained what

<sup>1</sup> See Appendix for some disclaimers.

<sup>2</sup> See Appendix Q for an important leading article in *The Times* on this subject, and other notes.

purported to be a story of a young man named George Flanders walking in the park with two ladies. On inviting them to tea he found he had no money in his pocket, and with some difficulty the ladies paid the bill, leaving Flanders in an uncomfortable and undignified position. The plaintiff's name was George Charles Flanders.

It was not a common name [said counsel] and whether the writer knew the plaintiff or not was quite immaterial, as had been held in the well-known case of *Jones v. Hulton* by the House of Lords. If the jury thought that a reasonable reader of the article would think that it was a libel on the plaintiff, he was entitled to damages.

A solicitor, of Hitchin, where the plaintiff lives, and two other witnesses, gave it as their opinion that the article referred to the plaintiff. The writer of the article said 'he had never known anyone named Flanders in his life, and the only human being he had heard of bearing that name was Moll Flanders.' Counsel for the plaintiff said 'it would be a lamentable thing if a case of this kind should be laughed out of Court. It was quite immaterial that the damage done to the plaintiff was done inadvertently.'

There we have an illustration of what the learned editor of the *Law Quarterly* describes as a novel Law being urged as an accepted principle, on the strength of a decision of the House of Lords. Thus the force of a legislative enactment is given to a figment which common sense repudiates.

The Lord Chief Justice said :

The case was hardly worth all the paraphernalia of summoning a special jury. If a person under the colour of journalism gratified his spite against another and held him up to ridicule and contempt, that was a libel; but it was admitted that there was no personal spite in this case. In dealing with it he should adopt the summing up of Mr. Justice Channell in *E. Hutton & Co. v. Jones* (*supra*), approved by the House of Lords. It was as follows, at page 24 :

‘The real point upon which your verdict must turn is, ought or ought not sensible and reasonable people reading this article to think that it was a mere imaginary person such as I have said—Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins, or any of that sort of names that one reads of in literature used as types? If you think any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person—those who do not know the plaintiff, of course, would not know who the real person was, but those who did know the existence of the plaintiff would think it was the plaintiff—then the action is maintainable.’

His Lordship then discussed the article, and continuing, he said that ‘they must not be misled into thinking that it was merely a question of coincidence of name. There was not in this case, as in the case referred to, any evidence that the plaintiff had suffered any substantial damage.’

After a few minutes’ consideration, the jury returned a verdict for the defendant, and judgment was entered accordingly.

It will be interesting to note the decision of the House of Lords in this case, if it is carried there. Exactly like the case previously cited, there is the

clearest evidence that neither writer nor publisher knew of the existence of the person who alleged that he had suffered injury. Where there was on knowledge there was no spite. Moreover, in both cases the plaintiff's friends thought he was pointed at. The fact that the imputation was more trifling in one case than in the other is beside the question: that is a matter of degree and affects merely the amount of damages that may be demanded. The important fact is that a novel<sup>1</sup> 'principle' has been added to our large stock. It is, that intention to do wilful wrong, a desire to inflict pain or humiliation, or even knowledge of the existence of the alleged victim, are no longer a necessary part of the ground of an action for libel. Our readers will not fail to notice that side by side with the emergence of novel features, which tend to promote litigation, the 'glorious uncertainty,' which has been a byword for centuries, is still a prominent characteristic of our Legalism.

<sup>1</sup> See Appendix Q.

## CHAPTER XXII

### THE MAGISTRATE

'He commits himself twice as often as he commits anyone else.'—  
*Charles Dickens.*

WE shall not dismiss this as a harmless and amusing play upon words or as an overstatement if we have some acquaintance with the records of mid-Victorian days. In 'Known to the Police,' Mr. Holmes writes :

A great change has come over the magistrates, perhaps the greatest change of all. It was their business to mete out punishment, and they did it. Some were old, too old for the office. I have seen one sleeping on the Bench frequently and only waking up to give sentence.

While there is no limit of age for Judges : while we are confidently assured by the shining lights of the Bar, who ought to know, that Judges improve with age, we cannot consistently fix a limit for magistrates. Why should not they, too, improve like the senior Bench ?

But notwithstanding the changes for the better, gratefully chronicled by Mr. Holmes, we are very far indeed from a condition that can be considered satisfactory. As recently as the year 1910 we find that Dr. Gerland, of Jena, in his work on 'The English Legal System,' mentions a letter

received from a barrister a short time ago in which the writer said he had appeared before a magistrate, who was unable to follow anything he said. The occupant of the Bench was in an extremely feeble condition of health and died soon afterwards. There is no mention of age in this case. When feeble health happens to be associated with weakness in legal knowledge, we have a possible explanation of this singular fact. A study of magistrates' decisions in this country suggests the reflection that they are not based upon a uniform system of jurisprudence, but, eclectically, upon the codes of half a dozen countries. So widely divergent are the sentences for similar offences; so eccentric seem the endeavours to make the punishment fit the crime. Here are two instances: they are reported side by side in a daily paper. A young fellow gets a month for breaking a window in a tavern. The driver of a waggonette was tried on the same day for dashing through a corps of cadets at a breakneck pace and scattering them to the imminent danger of life and limb. The magistrate thought the case would be met by the infliction of a fine of five shillings.

If our readers are disposed to think that the ends of Justice would be served by an interchange of sentences in these two cases, we must remind them that the Law has always respected property more than life. This is a remnant of feudalism from which we have never shaken ourselves free. We saw that the Law affords no adequate protection for the interest of any child who is not heir to

property. There is, moreover, a further qualification: it must be real property. Its possessions alone give the child value in the eye of the Law. Inverting the dicta of Ruskin and Burns, it says: 'The child is but the guinea stamp, the land's the gold for a' that.' Distracted by conflicting tendencies of environment and temperament and finding no definite guidance anywhere, it is not to be wondered at that the magistrate's duties present abundant opportunities for topsyturvydom. Nor is it at all unusual to find that his smattering of Law does him more harm than good. In no other sphere is a little learning a more dangerous thing, a truth of which the present papers will provide abundant confirmation to the minds of legal readers. Many freak decisions show an utter ignorance of human nature—a greater disqualification for the Bench than ignorance of Law. There are cases, according to Baron Huddleston, where men require more protection against women than women against men. Other decisions indicate a deplorable absence of human sympathy. In cases of begging, for example, perfectly ferocious sentences are occasionally pronounced. On October 15, 1907, the Chairman of the Staffordshire Quarter Sessions sentenced an old man to be flogged as an incorrigible rogue. His offence was begging and sleeping in the open air. This sentence—a piece of sheer medievalism—is technically legal under the provisions of the old Vagrancy Act. The Humanitarian League deserves the gratitude of the public for the promptitude of their action in this matter, whereupon the flogging was remitted by the Home

Secretary. A previous Home Secretary had taken occasion to inform the Chairman of the Dorset Quarter Sessions that 'flogging was not an appropriate punishment for begging or sleeping out, however often the offence might be repeated.'

We suffer grievously from the want of a central authority whose duty it should be to suggest the repeal of such barbarous Acts. It is apparently nobody's business to take the formal steps for their removal from the Statute Book. Nor is it anybody's business to effect the removal from the Bench of men who are incapacitated by advancing years or decaying faculties. The *Daily Mirror* of November 27, 1909, had the following report :—

An amusing reminiscence was recounted yesterday before the Scarborough Bench, when the newly constituted magistrates met for the first time. Joining in congratulations to the new Mayor-Councillor Ascough, Mr. G. Royle, solicitor, said the Bench were fortunate in having such an experienced man for Mayor. 'I can remember the time (he added) when I had frequently to plead before a Bench consisting of two deaf men and an imbecile.'

Truly an amusing paragraph ! In some countries the idea of finding amusement in a recital such as that would be considered a proof of decadence. But we are less squeamish. Our ideals of the administration of Justice are deplorably low. A crying need is a real Department of Justice. Laymen have an impression that the Lord Chancellor is responsible for everything appertaining to the administration of the Law—a manifest im-



possibility. Our legal caste has failed to organize itself in order to subserve the public interest. A pampered profession can only organize itself in its own interests. The go-as-you-please methods of the magistracy render possible such scandals as the following, which we find described in the *Daily Mail* of July 8, 1910 :—

The Visiting Justices at Preston Gaol have caused the instant release of four boys sent to prison by the Wigan Borough magistrates, by themselves (the Visiting Justices) paying the fines inflicted on the youthful offenders. The boys' ages ranged from 15 to 17 years. One of them was convicted for fighting; two for street gambling; one for obstruction. The fines and costs proved prohibitive for the boys' parents. The Visiting Magistrates state that the method of meting out punishment to young persons under 21 by some of the Lancashire magistrates stands in need of the closest investigation. A considerable number of young people are being committed who ought never to have become acquainted with the inside of a gaol.

It is a significant commentary on our much-belauded administration of Justice that appointments to the magistracy are made more frequently as rewards of party services, than from any other motive whatsoever. Nor is this surprising when we find the same motive dictating promotions to the senior Bench. A recent Lord Chancellor (Loreburn) has been harassed—we might say persecuted, if the association of ideas were not incongruous—because his appointments to the magistracy are alleged to be dictated by considerations unconnected with partizanship! Mr. Hilaire

Belloc's satire is not without justification. He will expound to us the real principle on which magistrates are selected:—

Instead of strict law binding men down by written words [he says] they appoint a number of citizens who shall have it in their discretion to decide whether a man's actions are worthy of punishment or not; and these appointed citizens have also the power to assign the punishment, which may vary from a single day's imprisonment to a lifetime. So crimeless is the country, however, that in a population of over thirty millions, less than twenty such nominations are necessary. I must, however, admit that these score are aided by several hundreds of minor Judges who are appointed in a different manner. Their method of appointment is this: It is discovered as accurately as possible by a man's manner of dress and the hours of his labour and the size of the house he inhabits, whether he has more than a certain yearly income. Anyone discovered to have more than this revenue is appointed to the office of which we speak. In old times this sort of minor Judge was not appointed unless it was proved that he kept dogs in great numbers and, at least, three horses. But such foolish prejudices have broken down in the progress of modern enlightenment and, as I have said, the test is now extended to a general consideration of clothes, the size of the house inhabited, and other reasonable indications of judicial capacity.

But the most serious objection to our present magisterial muddledom is unconnected with the choleric colonel, the parson who lives in an exhaust chamber of unsympathetic virtue, or the glorified grocer who looks on the magistracy as the crowning success in business, which is

perfectly consistent with Justice being treated as a commodity. The gravest objection of all would not be removed if all our magistrates were as competent as our most efficient stipendiaries. Even then a most invaluable training ground for future Judges would be wasted. In a well-ordered State, the junior Bench forms the beginning of the judicial career after the preliminary training. Between junior and senior Bench there is no impassable gulf. All beginners must have a *corpus vile* whereupon to experiment. This is supplied by small causes in the inferior Courts. Under close supervision, every judgment being scrutinized, the judicial capacity of the beginner is estimated and scheduled. In this way men, whose intellectual equipment is unsuitable for the discharge of judicial functions, are quietly eliminated before much harm is done. Nor is this really anything more than the application of ordinary business principles to the most momentous duties of a citizen. In all services and a great many businesses, certain aptitudes are held in special regard by the directorate. The only convincing proof of the possession of these aptitudes is by practical demonstration. And prudence suggests that the first experiments should be attempted by the tyro on a small scale. It goes without saying that the experiments would be of the same nature as future work. Fast bowling would not be held to prove the possession of the finely discriminating palate that is desirable in a competent tea-taster. He would be given samples of tea to classify. It would be ascertained

forthwith whether he possessed the critical palate. If so, it can be developed considerably; if not, he has mistaken his calling, and he is advised to try another in his own interest and that of the firm which is obliged to back its taster's judgment in tea for large sums.

Will our readers ask themselves in all seriousness whether weighing evidence is of less consequence than tasting tea? Is the possession of the judicial faculty in the junior and senior Bench a matter of less concern to this nation than the competence and discrimination of its experts to traffickers in tea? Or is it assumed that the whole catalogue of qualities which go to form the judicial faculty are the indefeasible birthright of every man in this fortunate isle, who has made money in business, done some soldiering, or preaching, or had a practice at the Bar? Judging by our past and present legal history, the answers would seem to be most emphatically in the affirmative. We make not the slightest effort to ascertain whether the future occupants of the Bench are possessed of the judicial faculty; we give them no opportunities for safe experiments; there is no discriminating supervision; there is no grading according to ability; there is no analogy whatsoever to any well-directed service or to any successful enterprise. Signal failure or certain bankruptcy would be the fate of any service or enterprise that appointed its officers or employes as this nation appoints its judges. According to the criteria that all other races apply to such matters, we stand convicted of profound ignorance or sublime

conceit. Our legal history suggests the probability that we are suffering from both in an advanced stage.

Both ignorance and conceit are largely the product of the efforts of our special pleaders of Bar and Bench, for it is impossible to exculpate the latter. In the scriptural phrase, they have filled our bellies with the east wind. And as this is their product, so also it is their profit. Do our readers imagine that it is merely for our entertainment that we have been flattered into giving heed to the fairy tales of Legalism? Has the conjurer a single eye to our amusement when he deceives us by sleight-of-hand while distracting our attention by a ceaseless flow of talk? Obviously his main object is to pay the rent of the hall and show a profit over and above it. In order to do so, he uses the tricks of his trade. There is nothing reprehensible in this. There is no fraud. We are deceived, but we know it. Whereas the legal conjurers who tell us, in effect, that Judges require no special training, that practice at the Bar is a sufficient preparation for the Bench, are deceiving us in our vital interests, deceiving us for our hurt. From this vast deception that has been practised upon the nation, there has arisen the impression—a perfectly natural inference—that any successful man is good enough for the junior Bench, no matter in what capacity his success may have been achieved. On the parent deception—worthy foundation for such a structure—there has been raised the ascendancy of the Bar. For be it observed that the Bar, being mainly interested

in fostering litigation, has more to gain in providing the Bench with great legalists rather than great lawyers. We have seen that all quibbles, all uncertainties, every kind of perverted ingenuity brings grist to the Bar. Its end would not be subserved by the nation following the universal experience of other races, other services, all enterprises, and giving Judges a continuous training in their special duties rather than in a form of activity which is largely a negation of those duties. Reverting for a moment to the tea-taster, there is nothing in fast bowling which warrants us in maintaining that an exponent of the art does not possess the discriminating palate. Whereas practice at the Bar tends, in the opinion of all communities but our own, to blunt the keen sense of Justice, and is therefore held to be a disqualification, not a preparation, for judicial functions.

Our special pleaders have persuaded us to ignore universal experience. What may be called a subordinate deception—that affecting the magisterial or junior Bench—also subserves the ends of the Bar. Its interests do not lie in the direction of small and safe experiments for beginners, the elimination of unsuitables and the survival of those possessing real judicial capacity. On those points which are of momentous import to the nation, the interests of the Bar, and these alone, have been considered. And part of the huge price the nation pays for the ascendancy of the Bar is a confused, bungling, and incompetent magistracy and the absolute waste of the natural training ground

which other races deem indispensable for the senior Bench.

I sat between my host (says the author of 'Notes from the Life of an Ordinary Mortal') and Kreisrichter No. 2 (the Deputy County Court Judge), a young gentleman of about twenty-eight, who had lately passed his examination for a Judgeship, and made many inquiries about legal affairs in England. He was mainly struck with the amount of advocate's fees, and the habit of appointing Judges only from among barristers in good practice.

If we look under the surface we shall perceive that these two circumstances are not in fortuitous juxtaposition, but stand really in the relation of cause and effect. Our method of selecting Judges accounts for the high fees paid to advocates. Fees are multiplied by increasing uncertainties, refinements, complexities--all the sophistical pedantry of Legalism. In order that the Bar may have a free hand to develop this mischievous form of ingenuity without let or hindrance, permit it to have the Bench of its choice and the thing is done. Further, to make assurance doubly sure, lavish on the Judges enormous emoluments which have a suspicious resemblance to huge bribes to secure complicity in the maintenance of conditions grievously unfavourable to the nation, but adding lustre to a caste. No species of corruption yet imagined is so plausible, so insidious, or so demoralizing as this. A further measure remained to be taken, the most important of all: a simulacrum of a Department of Justice was organized,

not to keep in close touch with the Judges, invite suggestions from them and keep a salutary control over them—no, that was not its purpose. It has tended all along to burke <sup>1</sup> inquiry and shield the Judges from the consequences of their blunders. We are now in a position to realize the fact that failure to utilize the magistracy for the obvious and natural purpose adopted in other countries is no isolated act of unsystematic indifference, but part of a process. It is not directed to the training of Judges, but to the raising of fees. By round-about methods masked by grandiloquent phrases, it has served its purpose admirably. But when John Bull's legal adolescence—unconscionably prolonged—shall have merged into manhood, and the special pleader's entertainment has outstayed its welcome, we shall come into line with our neighbours if, perchance, we can overtake them, and ordain a uniform, consistent, and dignified career for our Judges. Then youth, talent, and laudable ambition will be found on the junior Bench.

<sup>1</sup> The Lord Chancellor's office costs a trifle of £3600 a year. It is idle to expect that two or three officials can do the work which occupies a large number of highly trained experts among our neighbours. As a matter of fact the Lord Chancellor appoints the magistrates. But it is the Home Office which seems to perform the duties of a Department of Justice by inverting them, that is protecting the Judges rather than the public.—See *Mr. Francis Wellesley's letter on page 231*.

The following extract is from a letter written by Lord Lytton which appeared in *The Times* of July 1, 1912. It is headed 'The case of Lady Constance Lytton: A Reply to Mr. McKenna.' ' . . . Mr. McKenna in the defence of his department yesterday misled the House of Commons by repeating a statement which contained both a *suppressio veri* and a *suggestio falsi*. . . . The only reason, Sir, why I return to a subject which is intensely painful to me is because I regard with the



utmost dismay the prevalence of official lying of which the events of the last few years have provided us with so many examples.'

It will be observed that the Home Office includes the Department of Justice. Without presuming to enter into the merits of this case, we may be permitted to point out that Lord Lytton's letter is corroborative of the statement as regards the obstructive tendencies of the Home Office advanced by Mr. Wellesley, J.P.

See Appendix R.

## CHAPTER XXIII

### THE CYNICS OF BAR AND BENCH

'They chose themselves prophets and priests of minute understanding,  
Of the tribe that describe with a gibe the perversions of Justice.'

—*Mr. Rudyard Kipling.*

**I** CANNOT betray him,' says the profligate abbé in 'Adrienne Lecouvreur,' with unaffected regret; 'he is not my friend.' Thus the dramatist indicates the complete emancipation of the speaker from the obligations of sincerity, friendship, and religion. The abbé is an unconscious cynic; he is devoid of moral sense. He is the product of a period of religious decadence. During such a period, Luther, visiting Rome, observed to his horror that sacred mysteries were not infrequently the subject of merry jests on the part of the ministrants. Religion was dead and Clericalism held the field.

Legalism is Clericalism's younger brother. Its domination is not less fatal to Justice than that of Clericalism to religion.<sup>1</sup> Legalism develops the minute understanding, the reverence for fine points. These it elevates into 'principles.' The

<sup>1</sup> 'A force de raisonner, on a perdu quelquefois la raison, et on a vu avec douleur, que la morale des payens faisait honte à celle de quelques casuistes. Il n'y a point de crimes auxquels on n'ait trouvé des palliations et des excuses.'—*Lord Acton's essay on Mabillon, 'Historical Essays and Studies,' p. 465.*

microscopic eye sees nothing beyond them. Justice is eclipsed to the discomfiture of the laity and the glorification of the legal priesthood. The servants become the masters. Pedantic formalism has achieved this inversion of the natural order ; it assumes a sacred character, while respect for the spirit of the Law dwindles and finally disappears. Then Justice, for a season, bids the legalist world farewell.

When there is such a close analogy between Clericalism and Legalism—such antagonism between the ideal and the actual, precept and practice, conscience and interest as the counterfeits of religion and Justice present—we should expect the rank growth of cynicism in one to have its counterpart in the other. Nor are we disappointed. The contributions of Legalism take a very high place in the literature of cynicism.<sup>1</sup> They are found in the greatest profusion and in every conceivable variety. There have been English Judges who were as little credit to their ermine as the French abbé to his cloth. The late Mr. Lecky tells us that ‘there is a sort of mind that grows so enamoured of the subtleties and technicalities of the Law that it delights in the unexpected and unintended results to which they lead. I have

<sup>1</sup> The late Mr. Montagu Williams in *Leaves from a Life*, quoting Serjeant Ballantine, says : ‘The man most in my line was Clarkson, and it soon became apparent that either he or I must go to the wall. I infinitely preferred that it should be he ; and so I devoted my whole life to worrying him. I drove him first to sedative pills, and finally to carbuncles, and he died.’ Compare Lord Westbury’s remark about a rival : ‘I knew he had a pimple, but I did not think it had come to a head.’

heard an English Judge say of another long deceased, that he had, through this feeling, a positive pleasure in injustice.'

Charity would fain believe this extreme type of public enemy to be rare. It would be interesting to ascertain whether his decisions are marked 'dangerous' in the text-books, or whether they help to form the galaxy of pilot stars, the authorities which afford guidance to our Judges of to-day. Milder varieties of the cynic of Bar and Bench occur in such abundance that they form an abiding characteristic of our legal history. Perversions of Justice are their favourite subject. That fact is the condemnation of Legalism on the best of all possible grounds—that of internal evidence, its reflex action on its own priesthood.

In Mr. Merivale's 'Bar, Stage, and Platform,' the author, discussing Sir M. E. Grant-Duff's diaries, says:—

In all these kindly diaries, I have met but one severe allusion. He found himself among a nest of Judges telling comic tales. And every single tale, he says, turned upon some funny miscarriage of Justice. He went home sad and heartsick like the poor suitors. Even a great Justice has been found to say, with a laugh, of late, that his Court of King's Bench had nothing to do with honour or morality: a heart-breaking admission from such a source.

Sir M. E. Grant-Duff returns to the subject in a tone of regret. 'Stories about Judges turn' [he says] 'only too often, I fear, on the frightful injustice which is done by their idiosyncrasies; and, however they may amuse one, are not a

pleasant subject for reflection.' These two entries have special significance inasmuch as they appear to be exceptions to a rule to which the writer fastidiously adhered. It is found inscribed on the title-page of every volume of the fourteen. The words are Renan's: 'On ne doit jamais écrire que de ce qu'on aime. L'oubli et le silence sont la punition qu'on inflige à ce qu'on a trouvé laid ou commun dans la promenade à travers la vie.' The considerations which weighed with the diarist in making these exceptions may well form a justification for the present writer. He acknowledges a feeling of depression, not amounting to heart sickness, on reading that one of the greatest luminaries of the contemporary Bench had expressed himself as follows: 'He had endeavoured in days gone by to represent, or misrepresent, the views of the Law according to the side he was on.' (Laughter.)<sup>1</sup>

Contrast the respective attitudes of Judge and diarist to miscarriages of Justice! Therein is the abstract and brief chronicle of Legalism. It is the story of the dyer's hand. Not that we desire to attach undue importance to a jest in an after-dinner speech. At the same time the facility with which such themes rise to the lips of the barrister-Judge is not without its lesson for the layman. To the Judge, specially trained for judicial duties, a failure of Justice is a matter of grave anxiety

<sup>1</sup> Reported in the *Daily Mail* of November 2, 1909.

'Why should the man laugh at the mischief of the boy and make the disorders of his nonage his own by after-approbation?'—*Jeremy Collier*.

because his ideals are high. He misses an immense deal of amusement. That is the penalty of a finer sense, a mind toned to higher issues.

To the other, a failure of Justice is merely the delivery of a commodity not quite up to sample. There is such a refreshing freedom from prejudice, such a rollicking, devil-may-care indifference whether the stuff is good or bad ! That attitude is the result of long practice at the Bar. One may wonder how many verdicts his lordship's great forensic gifts snatched from somnolent juries and weak Judges when he misrepresented the views of the Law with becoming solemnity. And the suitors of yester year ? Where are those parties now ? When the consequences to unfortunate but deserving litigants are borne in mind, it becomes an interesting problem how the deliberate endeavour to perpetrate injustice under forms of Law can become the daily occupation of learned, upright, and honourable men without calling up an appropriate shade of regret on reflection.

When we hold up our hands in horror at the indulgences granted by Clericalism at its worst period, do we ever reflect that Legalism grants indulgences to-day to its priesthood for outrages on Justice ? Such is the indubitable fact ; and it is conclusive evidence of the true inwardness of Legalism's treason to the throne before which it pretends to bow. But that is not the worst : not only does Legalism grant indulgences for outrages on Justice, but it confers rewards on the offenders ; it gives them princely emoluments, titles, and, to the bewilderment of future ages,

**Judgeships.** Rarely has cynicism been carried to such a pitch as this.

In a trial in which a distinguished Judge, when at the Bar, was defending a man accused of wife-murder, before Mr. Justice Maule, there is an instance of elaborate facetiousness on the part of the Judge while acting as prosecuting counsel; while the defending counsel enters into a conspiracy to defeat the ends of Justice, succeeds, and relates the story with glee after being promoted to the Bench.<sup>1</sup> As a matter of fact miscarriages of

<sup>1</sup> In Lord Brampton's *Reminiscences*, p. 42, the Judge addressed one of the witnesses, a clergyman, as follows. 'You have given yourself, sir, a very excellent character, and doubtless by your long service in the village, you richly deserve it. The result, however, of your indefatigable exertions, so far as this unhappy man is concerned, comes to this'—his lordship then turned and addressed his observations on the result to me—'this gentleman, Mr. Hawkins, has written with his own pen and preached with his own voice to this unhappy prisoner about one hundred and four Sunday sermons or discourses with an occasional homily every year. These added to the week-day services make one hundred and fifty six services, homilies and discourses during the year. These again being continued over a period of time comprising, as the reverend gentleman tells us, no less than thirty-four years, give us a grand total of five thousand three hundred and four sermons, discourses and homilies during this unhappy man's life. Five thousand three hundred and four' [he repeated] 'by the same person, however respected and beloved as a pastor he might be, was what few of us could have gone through unless we were endowed with as much strength of mind as power of endurance.'

'I was going to ask you, sir, did the idea never strike you when you talked of this unhappy being suddenly leaving your ministrations and turning Sabbath-breaker, that after thirty-four years he might want a change? Would it not be reasonable to suppose that the man might think he had had enough of it?'

'It might, my lord.'

'And would not that, in your judgment, instead of showing that he was insane, prove that he was a very sensible man? That he was perfectly sane although he had murdered his wife?'

All this was very clever, not to say facetious, on the part of the learned Judge, but I had yet to address the jury. I was resolved to take the other view of the vicar's sermons and I did so. I worked Maule's quarry, I think, with some effect; for, after all his strenuous efforts to secure a conviction, the jury believed probably that no man's mind would stand the ordeal. And further that any doubt they might have, after seeing the two children of the prisoner in Court, dressed in little black frocks and sobbing bitterly as I addressed the jury, would be given in the prisoner's favour, which it was.

This incident in my life is not finished. On the same evening I was dining in the country house of a Mr. Hardcastle; and near me sat an old inhabitant of the village where the tragedy had been committed.

'You made a touching speech, Mr. Hawkins,' said the old inhabitant.

'Well,' I answered, 'it was the best I could do under the circumstances.'

'Yes,' he said, 'but I don't think you would have painted the home in such glowing colours if you had seen what I saw last week, driving past the cottage. No, no; I think you would have toned it down a bit.'

'What was it?' I asked.

'Why' said the old inhabitant, 'the little children who sobbed so violently in Court this morning, and to whom you made such pathetic reference, were playing on an ash heap near their cottage, and they had a cat with a string round its neck, swinging backwards and forwards, and as they did so they sang:

"This is the way poor daddy will go,

This is the way poor daddy will go."

'Such, Mr. Hawkins, was their excessive grief!'

'Yes, but it got the verdict.'

. . . . .

Commenting on this reminiscence the author of *Education, Personality and Crime* has the following remarks under the heading, 'Law is an Intellectual Form of Sport.' 'I should be very sorry to stir up the wrath of the legal profession at a period when we want their sympathy and assistance; for we are entirely in their power and absolutely at their mercy. . . . At a dinner of the medico-legal Society (1907) Sir Edward Clarke compared the doctor toiling for love in the alum with the barrister at work in his luxurious chambers; and further enlarged on the disappointment that a sensitive and honourable lawyer must feel at the results and character of legal methods. It is, however, only an excess of the sporting instinct perhaps unguided by and beyond the control of the true higher Ego. There is constant evidence of this



Justice, equally with the fulfilment of Justice, secure promotion to the Bench. The legend of the perfection of English Justice is our greatest invention. It proceeds upon the fantastic idea—which is cynicism in action—that a long course of gross tampering with Justice is the best preparation for its administration. Nor is the success just cited by any means an exceptional episode in the experience of great advocates, the Judges of the future. My greatest delight,<sup>1</sup> perhaps,' says Lord Brampton, 'was the obtaining an acquittal of some one whose guilt nobody could doubt.' The cynicism is unconscious; it has become a second nature. The humour of the situation consists in the fact that it is the Judge who delights in

instinct in the desire of counsel to win their client's cause, whatever Justice demands. . . . As this is but a type of what occurs in our Courts of Justice, one can only deplore the want of relationship between Law and true Justice which includes Truth, Righteousness, and the public weal. . . . Sport when uncontrolled and unguided tends towards depravity and inefficiency in rich and poor alike.'

<sup>1</sup> With this keen delight in outrages on Justice, compare Mr. Merivale's remark in the work cited in the text: 'For ten years,' he says, 'I stuck to my detested calling, haunted always by an uneasy sense that I had no earthly business to be championing causes which I felt to be wrong with the same happy complacency as when I knew them to be right. I wonder if that is why the lawyers never let their meetings pass without a general vindication of their virtues and a holding forth about their honour.'

Having regard to the fact that the man who cannot become reconciled to the devious ways of the Bar cannot reach the Bench in the British Empire (except in India), there is a high degree of probability in favour of the view that the very best of our raw material of Judges has never had an opportunity of aiding in the administration of Justice in this country. Legalism means the survival of the unfittest, the cynics, the egotists whose mask is 'sacred duty,' and the pedantic formalists who worship the letter.

recounting the triumphs of the advocate at the expense of Justice-advocate and Judge being one and the same person. Before taking leave of this incident, we may mention that Serjeant Ballantine in his 'Reminiscences,' says of Mr. Justice Maule, 'his manner was cynical. . . . His jokes upon the Bench were sometimes wanting in dignity.' This is not an over-statement; the cynicism occasionally extended to matter as well as manner, if we are to judge by the specimen given in a previous chapter.

In accordance with our purpose of forming an opinion of the various phases of Legalism from internal evidence, we shall give some instances of the insider's estimate of the jury system. Here, too, cynical humour is irrepressible. Even in its lighter vein, it should not be lost on the observant reader. For example: 'The man who addresses a jury, however great his experience, never realizes how little they understand of a case. In a "non-jury," the position is reversed—there is always the danger that the Judge may understand it all.' <sup>1</sup> Now we know why the Bar is wedded to the jury system. And what an admirable commentary on the whole duty of the advocate! It is to aid the Judge in ascertaining the truth!

Our acknowledgments are due to the same author for another specimen which is a singular blend of fetishism and cynicism. The case occurred on the Western Circuit. We are in the region of burlesque. 'The dignitaries of the

<sup>1</sup> *Pie-Powder*. By 'A Circuit Tramp.' (John Murray), 1911.

Common Law Bench when "non-juries" were first introduced, at times took strange views of their novel task. I remember one case being tried at Winchester, in which the lady manageress of an hotel sued for slander, the imputation being that she fortified herself for her duties with too much liquid. The Judge was one of the most learned <sup>1</sup> on the Bench, but he had little or no experience of the standard of temperance applicable to a plaintiff in her position, and he gave judgment as follows :—

' This case ought to have been tried before a common jury, and I can't conceive why it was not. If it had been, I know what the jury would have said. They would have said so and so, and so and so. *They would have been quite wrong.* But here I am sitting in the place of a common jury ; and I think, on the whole, I ought to find what I believe they would have found.' So he found it.

The italics are the author's. Truly a most learned Judge ! Finished product and long result of Legalism ! His judgment was rooted in a

<sup>1</sup> This incident illuminates as by a flashlight that mysterious entity which is accounted 'learning' by Bar and Bench. It may be capable of a hundred delusions which concern the public not at all. What is material is the obvious fact that it stands in no helpful relation to the dispensing of Justice ; on the contrary it is palpably at feud with Justice. Justice repudiates this pseudo-learning. There is no denying that it makes Judges traitors to their trust. The more 'learned' a Judge is, apparently, the more completely he is out of touch with Justice. When his 'learning' attains the superlative degree, then all sense of Justice has been crowded out by sophistical lore.

What would be thought of a biologist who was ignorant of comparative (or any other) anatomy, but boasted of his learning because he possessed a varied collection of freaks—men with twelve fingers, women with beards, degenerate and hideous types of different races ?

perverted idea of duty. And a profound mistrust of the jury system made him falsely true to it!

Gratitude to the advocate for aiding the supreme tribunal—the public—to ascertain the truth about the jury system cannot make us blink the fact that he is guilty of a piece of outspoken cynicism when he says:<sup>1</sup> ‘In this instance, Mr. Montagu Williams’ client did not escape; but the innumerable miscarriages of Justice produced by his oratory were ample compensation<sup>2</sup> for an occasional reverse.’ The late Mr. Montagu Williams’ triumphs at the Bar were of two kinds—triumphs of eloquence and triumphs of learning. This is his own account of a case that comes under the latter category. It is told with the most cynical indifference to the duty of the advocate: he compelled the Judge to extort a false verdict from the jury:—

‘The present Recorder was trying the case [he writes], which circumstance gave me some satisfaction, for I knew that among his numerous good qualities he possessed a technical mind.

The reader will observe that this is written, not in irony, but in all good faith. ‘A most technical mind’ in a Judge is a good quality from the point of view of the unconscious cynic. Mark the result. The great advocate had detected a grave defect in the indictment. He continues:—

<sup>1</sup> *Pie-Powder*, p. 176.

<sup>2</sup> ‘It is true the young man’s father is a soap boiler; but look at his mother! She comes of ancient Scottish lineage. During several centuries her ancestors were notorious for turbulence, treachery and assassination. Now that ought surely to wipe out the stain of the soap.’—*Mr. Andrew Lang’s ‘Disentanglers.’*

I rose and said, 'My lord, there is no evidence to go to the jury,' and proceeded to state my objection. The Common Serjeant listened attentively, and when I had finished he said with a smile (it was a gross case of fraud) to Mr. Poland, 'What have you to say to this?' No one in the world is more capable of getting out of a difficulty than my learned friend; but it was of no use. His lordship looked at me and said, 'Well, Mr. Williams, I am afraid your objection is fatal!' Then turning to the jury he said, 'Gentlemen! You possibly won't understand what has been going on. There is a legal difficulty in the way. The learned counsel for the prisoner has taken an objection, and I am bound to say, much as I regret it, that it is a fatal one. And now it is your duty, regardless of your conviction, under my direction—for it is a matter entirely for me—to return a verdict of "Not Guilty." I confess,' he added, mopping his eyes, 'I am exceedingly sorry, for a grosser case of fraud, during the whole of my experience as counsel and Judge, which extends over a great number of years, I have never known. But my duty is plain and so is yours, and you must return a verdict of "Not Guilty."' The jury, instead of at once obeying the mandate, turned round in the Bar and held a consultation. The Judge, who was never guilty of wasting time, then addressed himself to the foreman as follows: 'You and the jury must take the Law from me, much as you may regret it. . . . I direct you in Law to say that the prisoner is "Not Guilty."'

Such outrages are a matter of daily occurrence in countries where our Legalism prevails. This case, however, is noteworthy. It shows by internal evidence the dependence of 'learning' on the 'technical mind.' This quality is lauded by counsel and, while the Bar produces the Bench,

<sup>1</sup> *Leaves from a Life*, by Montagu Williams, p. 300.

its supply is assured. And so the actor-advocate, assuming the rôle of a priest of learned Legalism, inexorable as Calchas, in discharge of a 'sacred<sup>1</sup> duty,' demands the sacrifice of Justice. The High Priest, he of the 'technical mind,' makes haste to obey the behest. It is that of his progenitor, the Bar. Then the exploits of parent and child are published, gleefully, boastfully, tempered here and there by a touch of regret, for private gain and public demoralization. The learned one's promotion is assured. The announcement appears forthwith to the accompaniment of a proclamation by the herald that it is due to diligence in helping the Judge to arrive at the truth. Deep answers unto deep: the brutal effrontery of crime is a worthy response to the brazen effrontery of privilege.

In the end my client was acquitted [says the same great advocate, relating a story of atrocious murder]; and that same night, after drinking heavily, he passed down the High Street of the town, and, holding out his hand, he exclaimed, 'My counsel got me off, but this is the hand that did the deed.'<sup>2</sup>

<sup>1</sup> 'Vanity merges into solemnity as a profession develops in the direction of charlatanism. For it is a singular fact that the more questionable an art is, the more disposed are its exponents to believe that a priesthood has been bestowed upon them and that people should bow down before its mysteries.

'Useful professions are manifestly made for the public; but those that are of more doubtful utility can only justify their existence by supposing that the public is made for them.'—*M. Bergson in 'Le Rire.'*

<sup>2</sup> He was safe because 'a man cannot be tried twice for the same offence,' as the author points out. From what Sinai has this precious 'principle' been promulgated? Is it from blind adherence to it that the present deadlock is due and assassins are set at liberty because the Court of Criminal Appeal has no power to order a new trial?

The slayer, too, boasts of his slain when the Judges released him.

This is the record of Legalism in England, in America, in India. It is unapproachable in naked, unblushing, stupendous cynicism.

It is inevitable that such freak decisions, procured by one section of vested interest from another, should reduce the administration of Justice to a species of gamble. The fact is admitted with the utmost frankness in the following extract. We repudiate the universality of the statement in the first sentence. There is no comparison between a codeless chaos and a modern system.

<sup>1</sup> At the best there is an element of gambling in all litigation [says this authority, who generalizes from one system and that a caricature], nor do I know why counsel should not adopt the notation of the bookmaker to measure the risk involved. To tell a man that he has 'a good fighting chance' or 'a reasonable prospect of success' conveys no definite idea. . . . If he were told that in the opinion of his adviser the odds were two to one in his favour or six to four against him, he would understand better where he stood. But it is his business and that of his advisers to decide whether he can afford to take a six-to-four chance—say in hundreds; and the sole function of a Court of Justice is to see that he has a fair run for his money.<sup>2</sup>

This new departure finds its explanation in the

<sup>1</sup> *Pie-Powder*, p. 104.

<sup>2</sup> See note under Appendix G. 'The sheriff's men were engaged for some time yesterday in clearing bookmakers from the precincts of the Court.'

fact that since the counterfeit of Justice is treated as an article of sale, of which the value fluctuates enormously, few better gambling counters can be found. As a matter of fact, Legalism has more attractions from that point of view than from any other whatsoever. These advantages are being utilized in America; and the odds in favour of acquittal are very long when the tenor-advocate is in voice.<sup>1</sup> But what of those litigants who have honest suits but cannot afford to pay for tenor voices or take six-to-four chances in hundreds? The answer is that the counterfeits vaunted as English or American justice are beyond their means. Like fathers, in another legal cynic's phrase, they are a luxury for the rich. Nor is there much consolation even for them. The commodity for which they pay hundreds, when they do not pay thousands, is unsatisfactory to the last degree. The consumer deserves our sympathy when we find that it leaves a bitter taste in the mouth of the purveyor. There is more regret than satire or cynicism in the closing note of the work just cited. The idealism of the race emerges unexpectedly—a vague longing for Zion. Mark *l'envoi*: 'The ministers of the Law may be profitably reminded that all their incantations are

<sup>1</sup> On April 8, 1911, we read in the daily Press that 'The unwritten law was acknowledged by the jury at Fort Worth, Texas, to-day, when Mrs. Brooke, the wife of an eminent lawyer, was acquitted of the charge of murdering Mrs. Binford, whom she shot dead from motives of jealousy. . . . Counsel closed a powerful argument by singing to the jury in a tear-choked voice "Home, Sweet Home"; the song trembled on his lips . . . the verdict of acquittal was received with impressive demonstrations of applause.'



but necromancy<sup>1</sup>; and may by ill-hap but half materialize the fair vision of Truth.'

Passing over the incongruity (which is intelligible under the circumstances) of associating the search for Truth with the notation of the 'bookmaker' and the incantations of the augur, our readers will find in this pathetic valediction a corrective for the calculated insincerities of the special pleader. In an important section of its domain, Legalism is aptly described as a form of necromancy. It professes to extract guidance for living Judges from the confused and contradictory utterances of the dead; its priesthood resolutely exclude from their purview the garnered experience of other nations. These have achieved a large measure of harmony between Law and Justice. Vested interest prefers to hark back, with ostentatious cant, to a species of ancestor-worship—a policy which serves the double purpose of flattering insular complacency and perpetuating the discord between Law and Justice. From this antagonism there rises the whole gamut of cynicism—brutal, defiant, bitter, complacent, regretful. The same pestilent source is responsible for the jesting habit, whose indulgence in the performance of the most important duties tickles the ears of the groundlings and makes the judicious grieve. In the work already cited, Mr. Merivale addresses the following prayer to the tutelary deity of the Bench:

<sup>1</sup> Compare M. Chailley's statement, in the work already cited, to the effect that 'there was in Madras an astrologer who had a considerable *clientèle*. He pretended to be able to foretell decisions in cases before the High Court.'

Oh that the Judges would not joke so much ! Everybody has to laugh whenever they do it, badly or indifferently, with the helpless and heart-broken litigants hunting for indefinite hours the ' Halls of the Lost Footsteps,' miscalled the Courts of Justice.

That is the result of ten years' experience of Law as a member of the Bar, not as a litigant.

Our readers have now had an opportunity of observing the reflex action of our Legalism on its own priesthoods. Therein is pronounced its final and conclusive condemnation. It is clearly seen to be a solemn mockery of Justice because this significant fact emerges. On that point all the witnesses are in absolute agreement. Those who cannot reconcile themselves to the environment say so in unmistakable terms ; while the thoroughgoing cynics testify to the fact still more strongly by securing the acquittal of men of whose guilt there was not the slightest doubt. Unsophisticated humanity is staggered at the idea that the acquittal of an assassin, or the failure of a civil action through a trifling defect of form, can possibly be the subject of boastful recital or jesting comment by those who are entrusted with the duty of administering Justice. M. Bergson will help us to understand the portent. He has shown that merriment is possible only on condition that there is an entire suppression of the emotions. This means an utter absence of sympathy, complete detachment from the faintest shade of pity. Consequently the training of our cynics of Bar and Bench is proved to be such that it induces a condition which is described as anæsthesia of the

heart.<sup>1</sup> That is only part of the action of this insidious agent, Legalism. On the unjust but successful litigant, and all unscrupulous beholders, the effect produced is anæsthesia of the conscience ; on the honest but unsuccessful litigant, and all beholders who love Justice, it is anæsthesia of patriotism.

<sup>1</sup> ' Endeavour for a moment to interest yourself in everything that is said, in everything that is done ; act in imagination with those who act, feel with those who feel ; in a word, give to your sympathy its largest possible expansion : you will see that as by a touch of the magician's wand the most trifling objects assume weight and a severe colouring passes over everything. Detach yourself now, and be an indifferent spectator ; forthwith many tragedies turn to comedy. We have only to stop our ears to the music at a ball and the dancers appear ridiculous on the instant. How many human actions would withstand a test of this kind ? And should we not observe many of them changing from grave to gay if we could isolate them from the music of sentiment which is their accompaniment ? In order to produce its full effect the sense of the ludicrous requires something like a momentary anæsthesia of the heart. It addresses itself to the intelligence alone.'—*M. Bergson in 'Le Rire.'*

See Appendix S.

## CHAPTER XXIV

### THE JUDGE

'There is but one thing wanted in the world, but that is indispensable. Justice ! Justice ! In the name of Heaven ! Give us Justice and we live ! Give us only counterfeits of it, or succedanea for it, and we die.'—*Thomas Carlyle*.

**W**HY this cry of despair ? One would think we were drowning ! Justice a matter of life and death ! Who doubts it ? The Judges are administering Justice. Counterfeits, succedanea ! The dyspeptic recluse thinks there is nothing genuine in the world. Bosh !

We may thus summarize the comment of *l'homme sensuel moyen*, Carlyle's long-eared and afflicted early-Victorian brother, as he apostrophized the general body of his readers. Few of his first audience are left after the lapse of nearly three-quarters of a century. How does the appeal sound to-day ? Has it any relevance ? Are counterfeits still abundant and is Justice still scarce ? The question connotes no more pointed reflection on the Judges than was implicit in the sage's prayer.

To over-confident optimism the following considerations may be submitted : they are drawn from the various sections of Anglo-Saxondom,

To begin at home : Justice is increasingly inaccessible owing to the immense rise in the scale of barristers' fees ; the Courts are occupied more and more in trying actions brought by speculators who back their favourite actor-advocate ; worst feature of all, convicted murderers are set at liberty owing to a trifling defect in the summing-up ; the Court of Criminal Appeal has no power to order a new trial. We have had conclusive evidence in the last chapter that other criminals are not convicted because verdicts of acquittal are snatched by eloquence or ' learning ' from hysteria or the ' technical mind.' In civil cases ' learning ' covers itself with laurels and wins against Justice, owing to mistakes of the most trifling description which may readily be procured by fraud. In these, and similar cases, Justice is flouted and its dictates set at naught.

As regards America, there is President Taft's deliberate statement, made during the spring of 1911, that ' the majority of criminals in the United States escape punishment.' A more pathetic confession was never made by the head of a State since the battle of Pavia, when Francis I. admitted that all was lost save honour.

In India litigation is increasing by leaps and bounds. The weakness of the Bench is the subject of grave complaint. The condition of things existing in the High Court of Calcutta amounts to a denial of Justice. The Anglo-Indian public are alarmed, and the public at home disgusted, by the frequency of instances where technical

informalities<sup>1</sup> secure the escape of criminals, and we repeat that nothing is easier than to procure technical informalities by fraud.

It is well known that the English and American legal systems are based on the same lines. The Indian legal system is also ours in its main features. That system is now bankrupt in credit in all three countries, that<sup>2</sup> of its birth and those of its adoption. Here we are confronted with a singular anomaly—it is this: a legal system that has had a most patient trial under every variety of condition in two hemispheres is a proved failure, notwithstanding the exceptional excellence of its chief protagonists, the Judges. These are recruited from the Bar with few exceptions, which apply to India only. A distinguished Judge,<sup>3</sup> himself a whilom member of the Bar, assures us that this method of recruitment accounts largely for the

<sup>1</sup> This is one instance out of many. On November 27, 1910, we read in the Press that 'A year and a half after the trial began the High Court of Calcutta gave judgment on the anarchist prisoners who were arrested after the murder of the Kennedy ladies. Through a technical informality the two chief criminals have escaped the death penalty.'

<sup>2</sup> Referring to the famous Stoddart case in 1910, in one phase of which no fewer than five Judges were occupied hearing an appeal, the leading journal wrote: 'The existing system of judicature, superior and inferior, no longer suits the country. By universal admission large changes of some sort are essential. The fact is that an old order is breaking up, and a number of forces, some of them new, are struggling for mastery.'

<sup>3</sup> In an after-dinner speech at the Mansion House on June 19, 1909, Lord Chief Justice Alverstone was reported to have spoken as follows: 'To what did they attribute the confidence which was felt in the judiciary of the Empire? In his opinion it was to a large extent owing to the fact that their ranks were recruited from the experienced members of the Bar.'

confidence which is reposed in our judiciary. This is opposed to the experience of other countries, where a different system prevails. The common belief, however, is that other countries can offer no parallel to the cosmic excellence of our Judges. They are supreme, high-throned all heights above. To such an extravagant pitch has this legend been carried that any criticism, however mild and measured, seems to many people tantamount to laying sacrilegious hands on the Ark of the Covenant. This matter is of the utmost importance and demands careful investigation.

The claim to pre-eminent superiority over their *confrères* of other nations, which has been advanced on behalf of our Judges, seems to be unsupported by any evidence whatsoever. It is, as a matter of fact, more mythical than legendary. Its mushroom growth deprives it of any title to the latter appellation. We need not refer to the ignorance, cynicism and rapacity of many barristers and Judges as described by Sir William Dugdale<sup>1</sup> in the seventeenth century. Skipping a century and a half—which is part of the Dark Ages of our legal history—we find in the first quarter of the nineteenth small improvement compared with the report<sup>2</sup> of that chronicler. The Old Court of Chancery was still continuing its depredations, at which Judges connived and by which they benefited. There was manifestly a complete absence<sup>2</sup>

<sup>1</sup> See Chapter VI.

<sup>2</sup> 'No one can doubt,' says Serjeant Ballantine, writing in 1882, 'that the general administration of the law has, during the last half century, improved in every branch; and the present generation would

of any ground in which the hardest myth of their superiority could take root, unless it grew, like the mango tree of the Indian juggler, without any root whatsoever.

Even more recently than the first quarter of last century the reasons that were openly alleged for the promotion of Judges and the glaring incompetence of some of the nominees were calculated to bring the administration of Justice into contempt, rather than to supply the slenderest scaffolding for decorating the façade of Legalism with numerous statues of men of great attainments and high character. Such men were extremely rare<sup>1</sup>

scarcely credit the amount of villainy, fraud and oppression which, previous to that period, flourished under its auspices. The gaols filled with victims; officers of the sheriffs robbing both creditors and debtors; small Courts, the offices of which were put up for sale and the costs incurred by the suitors, brought ruin to both parties. . . . Immense taxes were imposed upon legal proceedings by numerous sinecure offices paid out of suitors' pockets.'—*Reminiscences*, p. 372.

<sup>1</sup> *Idem*, p. 59. 'Phillips himself kissed the rod that chastised him and became a constant associate of Lord Brougham, who made him Commissioner of Bankruptcy at Liverpool, an office for which he was singularly unfitted. Subsequently he was appointed one of the Judges of the old Insolvent Court, which required a good knowledge of figures, of which he knew nothing.' And his colleague, who knew little more, was a gentleman notoriously more insolvent than most of the suitors who sought relief at his hands.'

*Idem*, p. 71. 'The mode by which officers called to perform high judicial duties are elected is a scandal to the age.'

Lord Brougham in '*State of the Law*' (1828), p. 26.—'Is it a fit thing, I ask, now when Popery is no longer cherished or even respected, indeed hardly tolerated among us, that one of its worst practices should remain, the appointments of some of the most eminent Judges in the Civil Law Courts by Prelates of the Church? . . . Is it a fit thing that these Judges should be appointed not by the Crown, not by the removable and responsible officers of the Crown, but by the Archbishop of Canterbury and the Bishop of London?'



until a somewhat later period when corruption had been swept away and Judges were no longer financially interested in Court fees. From that time forward we have had men of integrity on the Bench. Then the special pleader saw his opportunity to make up leeway, and, in his character of impresario, he heralded the advent of a Judge supreme in learning and probity. The desired of all the nation's idealism had come. The Bar beheld the work, recognized its advantages from the point of view of advertisement, and pronounced it good. There has been a marked tendency of recent years, to push respect for this shadow-picture to the point of uncritical reverence: to make of the great position of Judge a fetish which would exempt the most unbecoming vagaries of the individual from censure when shielded by the dignity of the office.<sup>1</sup>

At the same time there is a singular exception made to that dignity, and we perceive that Civilian-Judges in our Eastern dependency are still labouring under grave disabilities. Consequently we become aware of the fact that Judges who bear the hall-mark of the Bar, and these alone, are objects of solicitude to Legalism, no matter how great the gifts, attainments, and integrity of those others may be. There is no question of the public welfare; it is a purely professional matter, and the parent institution will shine with reflected lustre if an additional halo is bestowed upon the child. We have seen that he is a model of filial

<sup>1</sup> 'There is no worse heresy than that office sanctifies the holder of it.'—Lord Acton's *Historical Essays and Studies*, p. 504.

affection and protests that his excellence is due to the parent. There is a novel feature in this policy of mutual admiration. The cry has been raised recently on most inadequate grounds : 'This is belittling the Judges.' There we note the emergence of the true persecuting spirit. It is another link between Legalism and Sacerdotalism. 'To the Inquisition with him! He dares to sneer at Holy Church!' It is an excellent indication of kinship between institutions when they demand an equally abject allegiance from their adherents.

Truth to tell, truculent champions do the Judges a signal disservice. Their action serves to emphasize the contrast between indiscriminate eulogy lavished by vested interest and irreverent criticism<sup>1</sup> pronounced by popular opinion. There are cases when unusual severity is justified by exceptional provocation. It cannot be denied that appointments to the Bench have, at times, assumed the proportions of a grievous scandal. Our methods of filling the most responsible positions in civil life are more irrational than drawing the names out of a hat. Membership of the Bar is an indispensable condition; distinction at the Bar is a prominent qualification,

<sup>1</sup> Mr. *Punch* may be taken to represent popular opinion. In its issue of October 25, 1911, an ex-Lord Chancellor speaks: 'Oh, by the way, I think I ought to tell you why I made . . . a Judge. It's a splitter! (He tells it and the meeting is dissolved in laughter.)' Names are mentioned *en toutes lettres*, although suppressed here.

which is comical, because that special distinction is achieved by the exercise of qualities incapable of reconciliation with the development of the judicial faculty.<sup>1</sup> Moreover, political motives procure the promotion of men who are advocates by temperament as well as by profession, hot-headed partisans<sup>2</sup> by decree of nature—that is farcical. Again, men are passed over, for political reasons, who have had exceptional opportunities of proving their possession of the judicial faculty; to waste such men is criminal. Finally, when we consider the grotesque circumstances surrounding the selection—together with the fact that the exclusion comprises all who are congenitally impatient of the atmosphere of the Bar—there is a high degree of probability, amounting practically to a certainty, that we have never had a judiciary

<sup>1</sup> It is the negation of reason and experience to suppose that the habits of half a lifetime can be put off like a garment. The President of the British Association at the Dublin meeting in September 1908 will settle the point for us. He said: 'This is the characteristic *par excellence*, of habit—namely, a capacity acquired by repetition, of reacting to a fraction of the original environment.' One concrete example will suffice. It is from Serjeant Ballantine's *Reminiscences*, p. 283. He says: 'I cannot assign to Sir Alexander Cockburn the almost unqualified praise I have given him as an advocate. He carried naturally the qualities that had distinguished him in that capacity to the Bench and exercised them without sufficient discretion.'

<sup>2</sup> In its issue of December 1, 1911, writing of a Judge lately deceased, the leading journal says of his appointment: 'It would be untrue to say that the choice was universally approved, and it is possible that party claims were considered as much as legal qualifications. There were at least half a dozen men with better credentials. . . . "In a moment," said the Judge characteristically, "I determined to back my opinion against the evidence." In this case he proved to be right. But the learned Judge a little too often backed his opinion against the evidence.'

really representative of the best qualities of the race, except in a few instances. What we have had, in fact, has been an elevated section of the Bar rather than a Bench. That this proposition is irrefragable will be admitted by the unprejudiced observer. Consequently the superiority of our Judges in the mass is seen to be the most inflated of all the special pleader's bubbles. It is not denied that we have had great Judges. Be it observed, however, that 'greatness' is a relative term—relative here to highly misleading conditions. Certain Judges have acquired a reputation chiefly by those cynical sayings which rise like a miasma from the morass of Legalism. If we desire to form a sound estimate, we must compare our Judges and jurists with the members of other professions and with men of science. Our lawyers are the most highly paid of all public functionaries or private practitioners: taking a large view, how do the lawyers' contributions to the common stock compare with those of other forms of activity? To ask the question is to answer it. Over against a vast cloud of witnesses representing the army, the navy, medicine, science, and the industrial arts—empire-builders in the best sense of the word—we see only an attenuated group of Judges and jurists who can claim that distinction. The special pleader urges that the comparison is unfair, because the respective conditions differ essentially. We deny the essential distinction. It is monstrous to suggest that the custody and perfecting of the great national standards do not offer magnificent opportunities to

worthy workers. The national well-being is more intimately associated with the soundness and precision of these standards than with the principles that underlie any other form of human activity. Moreover, Judges and jurists on the Continent do not shrink the comparison we have suggested ; on the contrary, they challenge it. Their work is the delight of their countrymen. Let any man who mixes freely with his fellow men tell us, what sentiment is evoked in the mind of the public by the Common, as compared with the codified, Law ? A profound scepticism, a deepening mistrust. The administration of the Law in this country has emerged but recently, as we have seen, from associations of comparative degradation. Our ideals of fair play are higher than those of any other race ; but here a singular phenomenon manifests itself : we never associate the idea of Law with fair play ! That is a matter of common knowledge. Justice is treated as a commodity. It has been ' cornered ' by the Inns of Court ; it is ancillary to politics ; its expense is prohibitory for the million who have most need of its protection. We are now in a position to affirm that Carlyle's arresting appeal is not only relevant to-day, but a matter of extreme urgency. We have an abundance of counterfeits and succedanea ; but where there is not cheap Justice there is no Justice.

When we find that our neighbours, without distinction of class or party, are grateful to their Judges and jurists for codes which render the administration of the Law cheap, certain and

expeditious, we are compelled to ask ourselves whether we can hold our Judges free of blame for the opposite conditions which unfortunately obtain in this country, indeed throughout Anglo-Saxondom? Not only have their champions' claims to superiority vanished utterly, but their very extravagance suggests that they have been advanced as a device to cover a marked degree of inferiority, on the part of our Judges, to their *confrères* across the Channel and the North Sea! If it is urged in defence of our Judges and jurists that our Laws are not in the main current of Western European jurisprudence, we ask in whose interest have they been kept out? It is true that we are in a muddy backwater, but as an excuse for our legal luminaries—that is, as if a man who had made away with his parents pleaded his orphaned condition in mitigation of punishment.

Nor will the plea avail that the legislature alone is to blame. In Anglo-Saxondom, more than anywhere else in the world, lawyers control the legislatures. It is one of our characteristics, which puzzles the foreign observer beyond measure when he considers the confused and backward state of our law. It must be borne in mind that Judges in England and America are depositaries of the Law in a more fiduciary sense than any other Judges in the world. In America they are also custodians of the Constitution. In both countries the most extraordinary deference is paid to precedents. Owing to that fact and the absence of a system of codification, immense

discretionary<sup>1</sup> powers involve proportionate responsibility. A large and important section of the Law in a codeless country is in a state of flux. The Judges are in reality legislators in miniature. Not only so, but they go outside the domain of Common Law and entirely subvert the purpose of statutes. We have already referred to the disastrous results of this action in the past, and the same<sup>2</sup> process continues to-day. Certain grave

<sup>1</sup> In Serjeant Ballantine's *Reminiscences*, p. 153, we read: 'A reflection that forces itself upon the mind of everyone who has observed the machinery of our Courts is, how very much the fate of men and causes must depend upon the temper and disposition of those who preside; there is such an enormous amount of discretion vested in Judges which ought to be limited, though it could not be abolished.'

We give an instance underneath of how the Judge's discretion is sometimes used.

<sup>2</sup> The purpose of the Legislature in passing the Gaming Act has been completely frustrated. That Act declares that a gambling debt cannot be recovered by process of law. But Judge-made law is equal to the occasion, and by an adroit use of the great 'principle' of 'consideration' gambling debts can be recovered precisely as before the passing of the Gaming Act. Nothing can be simpler. The loser has only to ask the winner of the bet for time. If the latter consents, that is a 'consideration' in law. He has refrained, at the other's request, from doing something to his detriment. He has not denounced him to the committee of his club as a defaulter. He has not had him 'posted,' so it is clear that refraining from extra-legal pressure constitutes a 'consideration' because a gambling debt cannot be recovered by process of law. But observe how deftly a 'consideration' can be introduced to make it recoverable. Its character is changed as if by enchantment and in defiance of the enactment.

The case quoted before Mr. Justice Ridley as authority for this turning movement is *Hyams v. Stuart*, 1908; there we have before our eyes a recent instance—we do not say the only one—of the process of subversion of the Statute law. For the knowing ones, who are much too artful to press unduly for the payment of a gambling debt, the Gaming Act is as dead as Queen Anne.

Mr. Justice Ridley did not doubt that he was bound by the judgment in the case cited rather than by the manifest purpose of the Act. 'It

consequences obviously follow from this exceptional relation of the Judges to the Laws of which they are not only the administrators, but on occasion the framers and the repealers; for such in effect is their real position. They are therefore debarred by the nature of their past and present action from assuming the attitude which might become Judges administering a rigid code. These are justified in saying we are here to administer the Law, not to amend it; that is the function of the legislator. Our Judges, having long assumed or usurped this function, cannot have it both ways. As they alter and modify, the corresponding duty is incumbent upon them, which is to make recommendations, to suggest the removal of anomalies, so as to avoid failures of Justice. Otherwise we are manifestly journeying towards legal anarchy. Our Judges seem to recognize their duty in this respect, and so we read occasionally that they have made representations to the authorities on certain flagrant failures of Justice.<sup>1</sup> Now comes the question: Who are these authorities?

is clear,' he said, 'that a gambling debt cannot be recovered. It is clear, also, that if there is other 'consideration it may be recovered.'

That is to say, a super-subtle defence, set up by an advocate, it may be, without the slightest belief in its soundness and with little hope of its success, is accepted by a Judge, possibly in a moment of inattention. And so an Act of Parliament is subverted. Apparently it is no part of anyone's duty to call attention to the fact that an Act that has been seriously discussed for days, passed both Houses and received the Royal assent, has been degraded into a species of trap. Legalism is the great solvent of Acts of Parliament.

<sup>1</sup> It is forcing an open door to labour this point. Two or three instances will suffice. In trifling matters, such as the law about dog-bite, magistrates have been pointing out for years past the gross injustice of the present rulings. Nothing is done.



The vagueness of the description bodes ill for the success of the quest. These authorities are the Mrs. Harris of Legalism. There are no such authorities if a real, live Department of Justice is meant. Nominations to the magistracy are made

To proceed to more serious matters: witness the deadlock between our authorities and the Court of Criminal Appeal. The Judges, defying Justice in allegiance to the letter of the law, are releasing convicted prisoners owing to technical informalities, because they have no power to order a new trial.

The following letter refers to matters of a still graver character, viz. the manufacture of criminals and the degradation of the innocent. It appeared in the *Daily Telegraph* of February 16, 1911. The writer is Mr. Francis Wellesley, J.P. for Surrey and a visiting Justice. He writes: 'During the years 1907 and 1910 the appalling number of 1791 juveniles were received in one prison alone, viz. Wandsworth. I have in my possession a mass of correspondence with the Home Office relating to certain commitments during these two years. Although Wandsworth is the County of Surrey prison, the overwhelming majority of imprisonments were by the London stipendiaries, and two at least of these boys were proved to be under the legal age of 16. The offences which caused these 1791 committals were such as disorderly conduct, riding a bicycle without a light, loitering, using abusive language, selling newspapers on railway property, obstructing the highway, driving lame horses, sleeping out, being on enclosed premises, letting off fireworks, begging, drunkenness, and petty larceny.

'Certainly the majority of these offences were committed by first offenders, and in those cases in which fines were first inflicted it was a rarity to find that time had been given in which to pay the fines. Hardly any of these lads were sent to the second division; on the contrary, they were committed just as regular criminals would be.

'Let me give just one illustration. A boy of 16 bearing an irreproachable character was fined £5 for larking round a bandstand; and, to quote Mr. Churchill, "being no more able to pay the fine than to pay the National Debt," was committed to prison in default. The Prison Commissioners do all that they possibly can, and the different Prisoners' Aid Societies assist in repairing the mischief in so far as they are able. But my personal experience of the Home Office is that it does nothing but obstruct investigation by every possible contrivance.

'No sane man questions Mr. Churchill's zeal for reform. But let it be remembered that behind him is entrenched the very same machine

in the office of the Lord Chancellor. It is idle to expect that a small staff, whose united salaries amount to little more than £3,600 a year, can deal with the representations referred to above. It is understood that they are addressed to the Home Office. It is well known that the legal side of this office has raised circumlocution to the dignity of a fine art. There is not a tittle of evidence that it acts in the interest of the public. On the contrary, there is every indication that it receives its inspiration from the Inns of Court. When the Bar secured the exclusive recruitment of the Bench, only one further triumph remained. That was to possess itself of the organization which, in other countries, exercises a salutary control over all ramifications of Justice, higher and lower. It keeps in close touch with the Judges. It invites their criticism of all defects, with a view to amendment. It studies and tabulates all decisions. In full recognition of the fact that Judges are the most important of all officials, it does not leave them to be a Law unto themselves; on the contrary, they feel that exceptional merit will be recognized, and slackness and eccentricity duly noticed. This is the way in which all efficient services, civil, military or ecclesiastical, are managed. In this and no other way can a successful commercial business be conducted. Although Justice is assuredly a supreme quality, not a com-

which blocked investigation in the Beck case and opposed to the last hour the establishment of the Court of Criminal Appeal'

For another letter from Mr Wellesley on this most important subject, see Appendix T.

modity, yet; if it is to assume a vesture of flesh and dwell becomingly among men, its Ministers must necessarily be governed by the same general principles which are contrived to ensure efficiency among those who follow humbler avocations. On the evidence before us, the Home Office presents conditions which are the negation of efficiency. Charity prefers to believe that there is no deep design against the public welfare in this grave defect. It is readily accounted for by the fact that Legalism has little need of a central directorate : it has no central idea, no guiding principle : it corresponds to an invertebrate organism. Reverence for the letter is, in its nature, of purely local application ; it is concerned with fine points ; it is incapable of seeing a cause sanely and seeing it whole. Examine Legalism throughout and the analogy to an invertebrate organism holds good. Each Judge, in the exercise of large discretionary powers, is a Law to himself. The recruitment of the judiciary is influenced by so many cross, confused, and contradictory purposes that it may be appropriately described as a process of abscission from the Bar ; it is impossible to indicate the point where the division will take place. Inertia is naturally the prevailing characteristic of the nominal head of an invertebrate Legalism ; and its capture by the Inns of Court would have no deeper purpose than to perpetuate the stagnation, with an occasional exception in the form of an active intrigue against codification. All other operations would proceed automatically. Observe that a system which, in externals, has the appearance of

being over-centralized<sup>1</sup> is, in reality, the exact opposite.

When John Bull's legal adolescence—unconscionably prolonged—shall have finally merged into manhood; when he determines to come into line with his neighbours; when the bubble-blowing of the special pleader provokes derision, there will be demands for a real Department of Justice, instead of the double-headed simulacrum of to-day, whose only virtue is modesty in hiding itself from the public gaze so that there is some doubt about its address. How is this inestimable boon of a real Department or Ministry of Justice to be secured? We mean a Department or Ministry conducted with a single eye to the public weal. We answer that if our estimate of them does not err, this boon will be conferred upon us by the action of the Judges. But we must distinguish: there are Judges and Judges.

Although the majority of them since the Norman Conquest have been administrators of Legalism, there has always been a minority, often extremely small, who, by grace of nature, rose superior to training and environment and administered Justice. Lord Mansfield,<sup>2</sup> one of the

<sup>1</sup> 'The concentration thus established has perhaps contributed to the ascendancy which English law, English lawyers, have so long enjoyed.'—Lord Campbell's *Lives of the Chief Justices*.

<sup>2</sup> 'The system on which he acted was censured as introducing too much of the Roman Law into our jurisprudence; and he was charged with overstepping the boundary between equity and law and of allowing the principles of the former to operate too strongly in his legal decisions.'—*Dictionary of National Biography*.

Holliday, Lord Mansfield's biographer, says: 'His great outline of conduct as a Judge was to make the rigid rules of law subservient to the

greatest Judges of any age or country, is the standard-bearer of the latter, Baron Parke<sup>1</sup> of the former. In these two Judges, one a great lawyer,

purposes of substantial Justice. He was not the first who, as some have erroneously alleged, softened the rigours of the law by the interposition of principles of equity. But, although he did not introduce novelty into this practice, candour must allow that he cultivated and improved this practice more successfully and in a greater degree than any of his predecessors.'

<sup>1</sup> Parke (1782-1868) — 'His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation (1855).'—*Dictionary of National Biography*. According to a mocking epitaph written for Baron Parke (Lord Wensleydale) he was a Judge 'qui summo acumine et summa industria leges Angliæ ad absurdum reduxit.'

The Legalists of to-day occasionally show a disposition to magnify Mansfield and repudiate Parke. Nothing comes amiss to the expert dialectician. The fact remains that Mansfield drew a heavy fire from the Legalists of the period and Parke was their mainstay. His admirers at the Bar and among solicitors levelled charges of inconsistency against the few Judges who sympathized with Mansfield's methods. Our laws are always a century or two behind the higher moral sense of the community. Mr. Roosevelt has commented on the wide discrepancy between what is legally permissible and what appeals to an honest man's sense of the fitness of things. When starvelings were hanged for stealing property worth five shillings, Legalist Judges, if they had qualms of conscience, took refuge in cynicism—for what is cynicism on the Bench but a covering for cowardice in the presence of injustice? Judges who regarded the spirit rather than the letter occasionally acquitted prisoners—whom the law was pursuing with extreme severity—owing to technical defects in indictments or procedure; the real reason being the bloodthirstiness of the law rather than the defect of form. In other cases of an entirely different character, the same Judges waved aside similar defects of form in the interest of Justice. To the formalist such inconsistency is *anathema maranatha*. Lord Mansfield was the head and front of this offence against form, and he was censured accordingly. 'And yet this admirable Judge lived for many years in the atmosphere of the Bar,' says the Legalist. The Clericalist has more sense of humour; he shows no desire to claim Voltaire as a product of Jesuit instruction. And how few Mansfields has the Bar given us to this intolerable deal of Parke!

the other a great Legalist, and in the schools which they typify, there is the perpetual antagonism between the spirit and the letter. Needless to say, we have no hope from the action of the Parkeists on the Bench. But there are considerations of the gravest character which cannot fail to have weight with those who belong, by temperament and conviction, to the opposite camp.

These considerations fall under two heads : those affecting this country and those that more directly concern India. The sister States are in a different category from either. Those great communities in a freer air are working out their own salvation. They have cheapened the Law by merging the duties of solicitor and barrister. At least one State has reverted to the Roman Law of inheritance, and mere technicalities are waved aside more and more in them all.

In this country, on the other hand, we are being bound more and more firmly in the trammels of an effete medievalism. Parliament is exploited by lawyers. The Bar is a waxing, the Bench a waning, power. The objections of a mischievous ingenuity are sustained. Ruthless assassins are acquitted. Progressive demoralization is still more marked in the civil domain. People of moderate means have long suffered practical exclusion from the Courts. These have now lost their attraction for the rich and are becoming the haunt of gamblers. An experienced member of the Bar recommends the adoption of the bookmaker's notation. Expense, uncertainty, and delay encourage the bold pillager. Hundreds of

bankruptcy petitions lodged against one individual indicate the inroads which this cancer has made into our national life.

There is a grievous exacerbation of this ailment in India. Friendly witnesses agree in considering the triumphs of technicality, alike in the criminal and the civil domain, a disgrace and a danger to our rule. The weakness of the barrister-Bench is being exploited to an incredible extent by the astuteness of the Oriental who delights in assimilating and developing all the manifold resources of Western chicanery. The consequence is that a swarm of lawyers, increasing<sup>1</sup> out of all

<sup>1</sup> In Mr. S. S. Thorburn's *Musalmans and Money Lenders* (1886) p. 132, we read: 'The number of legal practitioners in the Punjab in 1883 was 149. By the end of April 1886, the number has more than doubled, there being on the latter date 396. The annual rate of increase for the future will not be under 50. . . . Of the 396 practising in the Province on May 1st last, 308 were men of inferior qualifications, pleaders and mukhtars of the second grade. At a low computation the gross annual earnings of the Bar are 22 lakhs, almost all of which money comes out of the pockets of litigants. Of practising lawyers only 20 advocates and perhaps half the pleaders of the first grade received legal education. . . . These inferior practitioners are generally ignorant pretenders who prey on the ignorance of their clients. . . . To have to enter a Court as a principal in a civil case is a real misfortune for a Punjab peasant. It is an education in evil to him. However honest and unsophisticated he may have been when he first approached the contaminating atmosphere of the District Kutcherry or Munsif's Court, by the time the case is over he has eaten of the tree of knowledge; he is a fallen man. . . .'

Page 137: 'An increasing host of hungry pleaders is on the watch to manipulate the law to the protraction of Justice and their own benefit.' Page 140: 'The employment of pleaders and barristers in petty agricultural causes is equally condemned by native opinion. The native view is that as the matters at issue are extremely simple, the employment of such an agency is unnecessary and adds to the cost of litigation. . . . That the lower class of legal practitioners are usually men of bad motives, who foment more litigation than they

cure. These assertions are unquestionably true. It is, moreover, also true that for centuries prior to our rule the community have found it practicable to adjust those disputes without legal practitioners; and all the better men among them regard with regret the complication of their dealings with the Government by an agency of this nature.'

In *The Punjab in Peace and War* by the same author we read, p. 245: 'Successive legal members of Council treated India, with her diverse nationalities and conditions, as if the whole country were inhabited by a homogeneous and highly educated commercial people. . . . India was deluged by these three energetic and fertile-brained successors of Henry Sumner Maine, with a steady flow of intricate, technical, and sometimes even mischievous Acts, the want of which had never been felt, and the meaning of many provisions of which is a frequent subject of remunerative dispute to those who live by the law. Hardly any such Act passed between 1870 and 1884 is comprehensible to laymen. In England no prudent man is his own lawyer; he effects his transactions through professional experts. In India everyone managed his own affairs until we introduced complications, technical Law Courts, barristers and pleaders all recently congregated in respect of the Punjab by Lord Curzon, under the contemptuous phrase 'the paraphernalia of the High Court.' Even now solicitors and conveyancers are unknown outside the Presidency cities of India; and yet the law governing the simplest of contracts—a loan, lease or mortgage—is now so complex and artificial that all such ought to be referred to professional advisers. The masses have neither the intelligence nor the money to do so, which is one reason why the few who have both, aided by the law, exploit the many. As instances of the vexatious legislation referred to, the Specific Relief Act, 1877, and the Easement Act, 1882, may be cited.

When Sir Arthur (now Lord) Hobhouse introduced the former Bill, so ignorant was his fellow-Councillors of the meaning of the term 'specific relief' that he found it advisable to explain that the object sought was not the relief of the famine then prevailing in Madras and Central India, but of certain specified civil torts. After that the Bill was passed without serious discussion, the case being one of 'ubi tu pulsas ego vapulo tantum.' Many of the Acts of that period were of a similar character—measures introduced by a lawyer ignorant of India and passed by a Council ignorant of the measures. Now returning to the Easement Act, 1882, except the lawyer who devised, drafted and introduced it, hardly a civilian in India, Englishman or Indian, could have explained the nature of an 'easement,' and not one could have translated the title or any of the provisions in any of the eight or nine vernaculars of the country. In fact, the terms in most of the exotic Acts in force in India are untranslatable in any of the recognised



languages, and as to the eighteen or twenty current no combination of words could represent to the minds of the natives speaking these tongues the meanings intended to be conveyed. Under the Easement Acts, if a villager finds his familiar pathway closed to his ancestral field, he must be told in English—translation into any Indian language with or without literature being impossible—that he must ‘sue the dominant owner for a release of the servient heritage under Chapters IV. and V. of the Easement Act.’ As he does not know English—though even in English the words are hardly intelligible—if the man means to fight and wants to win he puts his case into the hands of a lawyer, and very likely a year or two afterwards has to mortgage land to meet his law expenses; if he is poor and simple he removes the obstruction, whereupon an assault or riot ensues, with consequent complications, all involving expenditure. Though the Act was applicable to the whole of India, the Punjab Government, wary by experience, pointed out that the people of the Province were still too backward to benefit by such an advanced measure, and the plea for delay was admitted. Whether the Government of India would have been so accommodating but for the growing outcry against doctrinaire legislation may be doubted.

All beliefs die hard, and none is harder to kill than the conviction that congested cause lists and a strong Bar indicated general prosperity and confidence in our Courts. ‘As well,’ scoffed a critic at the time, ‘may we look upon the multiplication of doctors and undertakers and the increase of pawnbrokers’ tickets as satisfactory proof of increased professional or commercial activity.’

Though ridicule had scotched it not killed further legislation of what was cynically called ‘ruffles for the shirtless kind,’ vexatious Acts already in force were so numerous and comprehensive that the Chief Court of the Punjab became a byword among the people as a ‘Court of quibbles, not of Justice.’

‘As each decision became, until superseded, a ruling, the mischief wrought when the law as declared was contrary to previous practice, custom or popular sentiment was considerable.’ Here some instances are given: this is one: ‘For many years the executive head of a district had usually described himself as “Deputy Commissioner,” but as the administration developed he also performed such functions as “District Magistrate,” “District Judge,” “Collector” and “President of the District Board.” In spite of their various titles some of the senior officers of the Commission, in the hurry of their multifarious duties, were still in the habit of subscribing themselves by the designation most familiar to them. The practice, though irregular, had never been challenged until the ‘eighties when the Chief Court on the revision side quashed all proceedings in a civil case because the District Officer, when deciding it, had written “D.C.” for “D.J.” after his name.

proportion to the real needs of the country, are preying upon the unhappy people. They are naturally prone to litigation, and among the congeries of races there are some whose rapacity

The ruling invalidated hundreds of costly civil proceedings all over the Province.

Perhaps the judgment which created the greatest demoralization, as it converted thousands of simpletons into rogues, was one which gave precedence irrespective of date to registered over unregistered instruments. The premium thus put upon dishonesty instigated debtors to repudiate their unregistered obligations by the hundred and make use of the same security twice over. . . . On the criminal side too, a whole host of unfortunate rulings might be quoted, some due to hair-splitting, some to the law itself. Of the former class was one which excited much comment at the time, to the effect that blank cartridges were ammunition but loaded cartridges were not. Women cases always created awkward situations, English and Indian ideas materially differing. On the following criminal ruling the consequences have been even more disastrous, but the law on the subject is unassailable. The Chief Court held that in cases of offences against married women, such as adultery, abduction unless marriage were preliminarily admitted or proved, could not be sustained. Since then the accused when sophisticated or defended by a lawyer invariably deny the marriage, and proof when possible is a costly and lengthy affair; aggrieved husbands failing to obtain justice from the Courts are forced to take the law into their own hands—a proceeding prolific in offences of violence and at the root of a large percentage of the murders and cases of arson and other mischief in the Province. . . . To return to the matter of unfortunate rulings, those given are a few out of scores, which either offended against common sense or were otherwise so unsuitable that they tended to bring our legal system into contempt. The fault did not lie with the Learned Judges—except when indulging in hair-splitting—but with the Law which they had to administer, and that Law was the product of a succession of up-to-date doctrinaire Members of Council, whose acquaintance with India began late in life and was confined to Calcutta and Simla. Each in turn was permitted by his fellow members, preoccupied as they were with the work of their respective departments, to devise, introduce, and pass a series of scientifically perfect general enactments applicable 'to all British India,' but wanted by no one, except perhaps a few needy lawyers as a means towards subsistence.' It is significant that Civilian-Judges are debarred from being legal members of the Council.

is unequalled in the Western world. Under such favourable conditions there has been a perfect orgy of Legalism, more especially during the last thirty years, when it received an enormous impulse from a succession of Acts forced upon a long-suffering country by proselytizing Parakeists from home. An incalculable amount of petty injustice and oppression is directly traceable to this source. It is the despair of the friends, and the delight of the enemies, of our rule in India.

A necessary condition of the continuance of a process which is slowly undermining the edifice of Empire is that it should be accepted without demur by the Judges. It is loathed by the Civilian Judges, one third of the Indian judiciary. It is defended by the great majority of barrister-Judges. Here a question of the utmost gravity forces itself upon our attention: Is it by a fortuitous combination of circumstances that our Judges are paid four or five times the salaries of their *confrères* on the Continent? These latter administer a codified system of civil Law at a cost to the litigant of never more than a quarter or a fifth, sometimes as little as a tenth, of our codeless chaos. The contrast between the two systems is startling, and forcibly arrests attention: that which is four or five times more detrimental to the litigant, as compared with the other, is four or five times more beneficial to the Judge! <sup>1</sup>

<sup>1</sup> At the time of writing (June 22, 1912) two ex-Lord Chancellors and one incumbent of that high office receive in pensions and emolument no less a sum than £20,000 a year. And we have no real Department of Justice.

In a country where a corrupt and indefensible sharing in Court fees, an insidious form of venality, was not considered dishonourable by Judges three-quarters of a century ago, it cannot surprise the judiciary of to-day if the association of princely emoluments and the ruthless exploitation of litigants suggest unfounded suspicions. These may be a matter of indifference to the Parkeists, but not to the depositaries of the higher tradition. They will rise to the height of this great argument and justify, for a minority of English Judges, the claim of superiority that has been light-heartedly advanced on behalf of all. Can those upon whom the mantle of the Master has fallen be in doubt about his attitude—could he have foreseen the injury inflicted upon the Empire by the technical formalism of a later day? Would he have been content at the present hour to salve his conscience by waving technicalities aside in his own Court? He would have seen the disease of Law, which he combated unflinchingly, spread far beyond the confines of the Empire and, carrying its ravages across the Atlantic, threaten to dissolve the North American Republic in a welter of lawlessness.

What Lord Mansfield would have done to save his country and his race from Legalism must remain a matter of mere conjecture. But we do know what the Japanese daimios did to save their country from feudalism. They gave proof of superiority to caste prejudice and vested interest. They accepted the new order, at an immense personal sacrifice, from motives of enlightened

patriotism. And, observe, the daimio had never taken an oath of fidelity to the Constitution or the popular cause; he was not solemnly pledged to it as the Judge is pledged to administer Justice. Therefore we decline to place the heathen daimio higher than the Christian Judge. We shall not do the latter the injustice of supposing that he is not conscious of a strong sense of incongruity on turning his face to the Law Courts after worshipping in church or synagogue at the reopening after the Long Vacation. These words are ringing in his ears: 'Let judgment run down as waters and righteousness as a mighty stream.' Meanwhile the procession is approaching those halls where Justice, if perchance it be found, trickles down, a feeble moistening of a thirsty land, the irrigation officer demanding payment of an exorbitant sum before the niggardly sluice is opened.

We are convinced that among our Judges there are those who will yet give an example of self-sacrificing patriotism, not incomparable to that shown by the daimios. They will put the country under a debt of gratitude by petitioning the Government to organize a real Department of Justice: a Department actuated by the supreme endeavour to bring Law into harmony with Justice: a Department which would profit by our neighbours' great experience in codification: a Department which would grade the judiciary without a break from the junior magistracy to the senior Bench: a Department, finally, which would provide and direct a special training for

the occupants of the Bench. The petitioning Judges will prove the sincerity of their patriotism by volunteering to forgo half their emoluments, grading judicial salaries from that point—which is that of the salaries of Judges of the Supreme Court of the United States—downwards according to ability and service: the country could afford Judges in equal numbers to those in continental States. Those who defend the present scale by stressing the necessity for absolute integrity pay our judiciary a poor compliment. Is integrity so rare in this country that it must be purchased at an enormous price?

The self-sacrificing action of the Judges which we have adumbrated would be the initiation of a national movement, an awakened public opinion, a new atmosphere in which judicial connivance at injustice, under cover of reverence for strict constructionism, would be branded with a moral stigma. Let no reader imagine that such a condition is only realizable in Utopia: for many years past it has obtained among our neighbours. A minority of the legal profession, comprising much of the youthful and all the generous elements, would give the movement an enthusiastic welcome.

For many notes and some specimens of Parkeist decisions, see Appendix T.

## CHAPTER XXV

### CONCLUSION

‘The causes of the decline and the prosperity of nations are always to be traced as at the source in the state of the law’ - *James Mill*.

**T**HAT is a doctrine which has been long despised and rejected of men in this country. Even to-day it is far from meeting with universal acceptance. A rival held the field in all but undisputed possession. It preached the practical nullity of Laws. They were a matter of supreme indifference, they and their framers, provided always that people had a sufficiency of patriotic songs. Lawyers applauded the sentiment to the echo.

They had good reason for chuckling with delight when another piece of good fortune befell them. This was the crystallization of their favourite doctrine, their mascotte, in an imposing couplet :

How small, of all that human hearts endure,  
The part that Kings or Laws can cause or cure !

Recalling the old adage about the people's songs, the poet felt that he was called to complete the rhymed outfit, rendering Kings and Laws equally nugatory. The couplet became a tenet. It was the XL. Article : it was accepted as a

revelation. Its appeal was irresistible because it arose out of our temperament and circumstances. It was an effect as well as a cause. The main current of our interest is in politics, which comprises constitutional Law. Therein all civilized countries are our debtors, while we remain babes in what may be called private Law. Here we originate nothing valuable ; we do not even borrow what is best. We are fascinated by a fine façade ; but the details, the living-rooms, the furniture, have no interest for us.

In countries that are much shaken by earthquakes a special sort of house is constructed, which is warranted to survive almost anything short of absolute engulfment. The material used is wood ; there is no question of architecture ; it is mere carpentry. The parts are strongly but loosely bound together ; rigidity is carefully eschewed. There is not a nail in the whole structure. The maximum of free play, of give and take, is obtained by the use of stout wooden or iron pins which are fitted loosely not into holes, but into slots. This assemblage of logs and boards, called by courtesy a house, is sensitive to every tremor : yielding to all, it is destroyed by none. That is English Constitutionalism.

But let the designer of the house apply the same principle to the furniture, and what a collection of crazy articles we shall have ! Imagine the genius of compromise presiding over the construction of tables, chairs, beds, and chests of drawers. In these articles the want of accurate joinering and the absence of rigidity are



exasperating beyond expression. A method which has secured immunity to the house from earthquakes provides a never-failing succession of surprises, spills and upsets for the occupants. The craziness of our outfit of private Law is universally recognized. But we still persist in leaving such matters entirely to specialists, just as we leave dentistry. We accept the dentist and the lawyer as necessary evils.

If we are just to the legal profession we shall admit that they themselves, like the doctrine that suited them so admirably, are also an effect as well as a cause of our backwardness in all that appertains to private Law. There was no deep Machiavellian design formed by the early denizens of the Inns of Court for achieving ascendancy and making a 'corner' in Justice. Legalism was as innocent of this purpose as Clericalism was of dreaming, in early Christian times, of setting its feet on the necks of kings: as innocent as the ivy of planning to strangle the oak. But in the corporate as in the individual life, in the Trust as in the ivy, the same tendency is immanent to cling and to climb, to follow the path of least resistance and turn to the sun. Our constant absorption in politics, our occasional spasms of interest in religion, our incorrigible indifference to Law, as proclaimed in the Article of faith just cited, made matters easy for the legal caste. There was practically no resistance, no balance of interests, no harmony of opposing forces which contribute to the national equilibrium. There was a tacit invitation to lawyers to extend the

frontiers of privilege. They did not fail to improve the shining hour.

If we hark back for a moment and suppose that our tastes and preferences had not been flattered by the large and comfortable assumption that Law was a negligible quantity in the life of individual and nation ; if the proposition had been examined with just a little detachment, it would have seemed to resemble a proclamation that henceforth all standards whatsoever, whether of value, weight, length, surface or capacity are a matter of indifference. The seller has a free hand. Let the buyer beware ! If he is treated badly he will do less shopping and save money.

Such sophistry in the domain of business would have had short shrift. But we never assimilated the conception of standardizing Law. To this day the possibility of such an achievement is denied by the great majority of English and American lawyers. And, after all, if the consumer is satisfied, or not too aggressively impatient, it is surely a work of supererogation on the part of the tradesman to cry up an advantage from which he himself is not to reap the smallest benefit. It is, on the contrary, very human to depreciate the alleged advantage or explain it away altogether. When the special pleader undertakes this task, self-interest and the professional weakness for dithyrambic effects destroy all sense of proportion, and so we find a boon and a blessing denounced in terms suggestive of earthquake and eclipse.

Thus circumstances connected with history and temperament, the rhymed couplet, the

rounded period, the plausible tarradiddle, the fulsome compliment to insular complacency, lay indifference and professional encroachment have achieved the present ascendancy of the legal caste. That is to say, a combination of favouring conditions procured time and opportunity to use the powerful instrument of ascendancy.<sup>1</sup> That instrument, although dependent upon the conditions mentioned, is distinct and separate from them. The instrument is the Law itself. A constantly increasing confusion and complexity—now by deliberate manipulation, again by culpable negligence—tend to create a danger zone round every conceivable subject. This the layman enters at his peril without at least one guide; the services of a second and a third are often required, nor is there any guarantee of safety with a multitude of counsellors and a just cause.

Here we perceive that our legal history provides a complete answer to the misleading couplet. That answer is the ascendancy of the legal caste. It shows the commanding influence of the great national standards and the strikingly effective use to which they may be put for evil—lay spoliation and caste aggrandisement. That answer is amply corroborated by the experience of our neighbours working on opposite lines; they borrow in constitutional Law and do original work in private Law, striving incessantly towards

<sup>1</sup> 'The idea that the object of constitutions is not to confirm the predominance of any interest, but to prevent it, . . . marks the highest level of the statesmanship of Greece.'—*Lord Acton*.

simplification, certainty, cheapness and expedition, more especially in civil causes. Again the transcendent importance of the great standards is made manifest—this time for good. To such perfection has the codification of Law been brought on the Continent, more especially in Germany, that a controversy springs up occasionally and learned dissertations are written for and against the thesis that Law is an exact science. This is not the place to embark on such an academic discussion. But we may remark, parenthetically, that those who support the affirmative are bound to establish a nexus between Law and the other sciences, none of which are isolated ; they form a chain or circle. Chess, for example, has precise rules, but is not a science.

But whether Law is an exact science or not, it is sufficient for our purpose that modernism in Law offers a complete contrast to medievalism ; and it is idle to close our eyes to the fact that between two countries, whose Laws have such a different orientation, there can be no possible equality of opportunity, in one country as compared with the other, for layman or lawyer. Under modernism the layman is the object of consideration ; under medievalism the lawyer. That ‘ law is made for lawyers ’ has been long a proverb in this country.

Let us take a subject which has not been referred to in the foregoing pages. It closely concerns our industrial life and has bearings even on the national safety. We mean the Patent Laws. It will hardly be believed that up to quite

recent years our Patent Office accepted fees and granted patents with the most complete non-chalance to A, B, and C for practically the same invention, leaving them to fight the matter out in the Law Courts. Not only were inventors ruined and invention shown to be the mother of necessity, but capitalists were deterred from extending encouragement to inventors from fear of lawsuits. For many years past the German Patent Office has required that all patentable inventions should show a valid claim to two features, viz. novelty and utility. The office undertook the task of verifying such claims. To this end a body of competent searchers was organized. It is difficult to exaggerate the importance of this service to an industrial community. An enormous stimulus was given to sound inventions. The capitalist took heart of grace. He knew that investing in a German patent did not mean purchasing a lawsuit. By discovering the connection between electricity and magnetism, Faraday demonstrated the potentialities of electricity as a motive power, but the first application of the principle was made in Germany. Aniline dyes were first extracted from coal tar in this country by an Englishman, but the immense aniline industry is now in German hands; in both cases thanks are due to the excellence of the German Patent Laws.

After having caused the loss of millions to the country, our Patent Office began to introduce reforms some years ago. It was shamed into introducing a search, but it chose a partial one. That is to say, it examined its own records only,

not foreign records also, as in Germany. There are serious complaints of the time occupied in this partial examination. It runs sometimes to four or five months. This makes a serious deduction from the statutory period of twelve months within which the complete specification must be deposited. Moreover, the search sometimes discloses an imperfection, such as a partial infringement, necessitating an amended specification. An extension of time costs an extra fee of £2 and the period is limited to three months. The net result is that the inventor in this country is heavily handicapped compared with his *confrère* in Germany. Not only is it alleged that our partial examination occupies more time than theirs; there is the further advantage in Germany that no statutory limit is set to the proceedings. The inventor has ample time to amend and complete.

The United States Patent Office has wisely followed the German example. We may well ask how it is that we adopt a poor species of compromise instead of coming into line? A partial search leaves the door open to litigation. Harassing regulations and inadequate time lead to much friction and the possibility of litigation. On the other hand, it is urged that our policy is not purposive, but the result of mere blundering. It may be so, but our contention is that deliberately contrived complications and sheer carelessness work together for good to litigation; and wherever lawyers are in the ascendant, litigation must and will be fostered. Again, it is urged that although it is undoubtedly true that in the vital domain of

Law careless drafting, confused and overlapping enactments, and excessive reverence for formal correctness have the appearance and effect of obstacles cunningly introduced to trip up the unwary layman, still these are mere coincidences and nothing more. The answer to this otiose argumentation is that coincidences cumulate to conviction in the study of Legalism. An admission of incorrigible carelessness and ineptitude is surely a pitiable defence of the most expensive legal equipment in the world and a quaint explanation of its phenomenal success in the struggle for existence.

Let us take another subject of less general interest than the state of the Patent Laws, but not without significance. We refer to actions for breach of promise of marriage. The reader will form his own opinion as to whether indifference, or calculating desire for gain at all costs, contributes most to the abuses, direct and concealed, of this survival of medievalism.

It is only in Anglo-Saxon countries that wounded affections have an equivalent in plain figures, and 'the jingling of the guinea heals the hurt that honour feels;' the amount depending on class and station. The amusement of the audience, the halting rhymes, the predestined discomfiture of the defendant are trifling incidents which expose us to ridicule as a nation, but the elements of tragedy are rarely present. Such actions are seldom brought by those who are called with propriety 'nice women.' They shrink from notoriety, having no desire to be the talk of the

town. Their temperament is an absolute bar to demanding damages as a solatium for a love that is dead and promises that are broken.

Actions for breach of promise are commonly the resource of the female speculator, who, nine times out of ten, is heart-whole. In her case a flirtation with the off-chance of a husband, or failing him an action for breach of promise, has all the attraction of a cheap 'put-and-call option' on the Stock Exchange. It belongs strictly to the domain of business, where the word 'business' covers a gambling operation. The Law approves it; the Court awards damages; the public is amused; the Bar is well briefed, and no one but the defendant is a penny the worse. He has had a bad quarter of an hour, no doubt. But, when the fine and his expenses have been paid, he is rid of what he has come to consider an entanglement. He swears a little at his folly in forgetting Mr. Worldly Wiseman's adage about being off with the old love before being on with the new. There, as far as he is concerned, the sordid business ends.

The real tragedies occur where such actions are never brought. It is a platitude that the world knows nothing of its greatest men; it knows just as little of its greatest martyrs. There are silent, sensitive sufferers who are made the unwilling instruments of bringing untold misery on helpless beings by the incidence of this Law.

Two young people become engaged at a foreign watering-place. The girl is being chaperoned by an elderly relative. The young man is home from India on short leave. He is unexpectedly



recalled to duty and leaves for the East without having met any of his *fiancée's* near relatives. After a few weeks, a telegram from his father announces that there are grave reasons against the match. Another agonizing period of suspense, and then the young man learns that the girl's family on both sides are chronic invalids, who rarely reach middle age. Aghast at the abyss that has opened before him, he hurries home as soon as he can obtain leave on urgent private affairs. His worst fears are confirmed. In great distress he appeals to his intended to release him from his engagement. She consents, but the consent is soon withdrawn. Her father and the family solicitor have other views. The girl is coerced into playing a part. An action for breach of promise is threatened. For many weeks a lively exchange of correspondence is carried on, to the great advantage of the solicitors. The young man's parents resolutely oppose the match. Their solicitor is prepared to produce overwhelming medical evidence against it, but such evidence goes for nothing in Law. The opposing solicitor, however, has correctly gauged the character of the young man. He cannot find it in his heart to defend the action. Distracted by conflicting emotions, he finally decides to reject the advice of parents, relatives, medical and legal advisers. He sacrifices reason to Law; the future to the present; posterity to petty prejudice. Two children were born of the marriage. After the birth of the second child, the mother had to be placed under restraint. Observe how the limbs

of the Law coin virtues as well as vices into fees. It is the price of blood. But what of the Law for which we are all responsible in greater or less degree? 'It should against such murders bar the door, not bear the knife itself.' The Law overawes honourable and sensitive men into perpetrating misdeeds<sup>1</sup> compared with which all other offences against the person and the State are venial. Treason to the race is the unpardonable sin.

In great matters as in small, in what concerns the race or the individual, the future or the present hour, we find the same wanton and callous indifference on the part of Legalism to all interests but its own. The element of uncertainty at all points is so formidable that we are justified in describing Legalism as a huge lottery. This aspect forces itself on our attention everywhere. It is seen at its worst in our breach of promise, our judicial separation, our divorce, our marriage and our illegitimacy laws. In an increasing order of flagrancy, these are neither more nor less than the recognition of a wild gamble in human life which, be it understood, is a gamble in Empire with enormous odds against us. The dice are loaded.

Rightly considered, there is the germ and

<sup>1</sup> 'In his opinion the action of breach of promise of marriage ought to be abolished. There were numerous miserable marriages that took place under the compulsion of an action of breach of promise of marriage. He had seen some of them himself, and if those actions were abolished it would have a direct bearing on the question of divorce.'—*Mr. C. H. Pickstone, Registrar of the Bury County Court. Evidence before the Royal Commission on Divorce. 'The Times' report, March 3, 1910.*

potency of the greatest danger implicit in the most trifling case where a just claim is thrown out on a slight defect of form.<sup>1</sup> Because Legalism is of a piece throughout, notwithstanding the perplexing tangle which it presents to the public eye. When meticulous precision becomes the be-all and the end-all, a supreme and indispensable condition, it is manifest that by the nature of things the guidance of a paramount principle, based upon Justice, is absolutely excluded. No Judge can serve the two masters—Justice and technical formalism. Not only most of our Judges, but our jurists and lawyers generally have been strict constructionists. Nor can it be doubted that unless extreme pressure from without lends overwhelming support to the minority within the legal entrenchments, the age-long tendency will not only persist, but receive further development. The following circumstances lend

<sup>1</sup> 'There seems great reason to regret that the prejudices of English lawyers in all ages have inclined them to confine their attention almost exclusively to the technicalities of their own peculiar code—ever more distinguished for precision than for enlarged principles.'—*Lord Campbell's 'Lives of the Chief Justices,'* p. 63. Compare the criticisms of our legal instruction by Dr. Gerland of Jena under Appendix A. The two distinguished critics are in close agreement. The policy of English lawyers may have been the result of prejudice in the first instance, but having regard to the fact that it is persisted in to this day: that it has foiled all attempts to achieve codification: that it has contributed in an eminent degree to their present ascendancy, it is impossible to avoid the conclusion that, however we may account for its beginnings, the reverence for technicalities—as against worthy principles—is now a conscious and deliberate purpose; and all the more reprehensible because it is a sin against the light. Lord Campbell's criticism is all the more remarkable because he had no inkling of the perfection to which the application of enlarged principles would be brought in twentieth-century codes.

support to this view: The immense success already achieved (for the profession) by a strict attention to technicality; the fact that by its means the largest possible tribute can be levied on the public with the least exertion, the application of broad principles requires serious study, not so the working of technicality; the access of numbers to the ranks of the legal profession in the House of Commons now that members are paid; the great increase in reported cases with every year; and, finally, the tendency of all bad things to grow worse.

Considered as an isolated problem, this prospect is one of the most depressing character that can possibly be imagined. In the vital province of Law we have an *imperium in imperio*, which subserves the interest of a class and, under the mask of fulsome flattery, is hostile to the public weal; it is indeed a parasitical growth of the most pernicious description. Introduced by despotism, bitterly resented for centuries, tolerated later by fatalistic indifference, profoundly mistrusted to this hour, the Anglo-Norman legal system has only been saved from utter discredit by Judges—unfortunately few in number—who though in it were not of it, and whose claim to reverence is that they administered Justice in defiance of its methods. Among those Judges who were its natural product, the most reputable were those devotees to form, the conscientious Parkeists who had sharpened the sword of Justice to the keenness of a razor, so that they might split hairs with it; while the less reputable were mere

gamblers with the lives and liberties of their countrymen—monsters of devouring egotism.<sup>1</sup>

<sup>1</sup> See Campbell's *Lives of the Chief Justices*, *passim*. Here are a few extracts. 'Odo, the first L.C.J., instead of attending to the duties of his station, made riches and power the chief objects of his pursuit.'

'Basset, Chief Justiciar at Huncote in Leicestershire in the year 1100, convicted capitally and executed no fewer than four score and four thieves, and deprived six others of their eyes and their virility; drawing upon himself the imputation of cruelty and not escaping the suspicion that he was influenced by the desire to enrich himself by the forfeitures that were incurred,' p. 16.

'Pusar was guilty of rapine and extortion, exceeding anything practised by his predecessors.'

'There seems little doubt that Tresilian (1382) flattered the vices of the unhappy Richard; and historians agree that in prosecuting his personal aggrandisement he was utterly regardless of law and liberty. . . . He was hanged for treason and malpractices,' p. 108, Vol. I.

'Belknappe was banished for being concerned in Tresilian's misdeeds.'

'In 1412 a general cry arose that the people were pilled [*sic*] by barrators and pettifoggers,' p. 134, Vol. I.

'Chief Justice Billings' name was long used as an impersonation of the most hollow, deceitful qualities which can disgrace mankind (1478).'

'Chief Justice Fitzjames (1580) had now lost all dignity of character and henceforth he was made a vile instrument to apply the criminal law for the pleasure of the tyrant on the throne, whose relish for blood soon began to display itself and became more eager the more it was gratified,' p. 164, Vol. I.

1534. 'I must confine myself to two most illustrious victims sacrificed by him, Fisher, Bishop of Rochester, and Sir Thomas More. . . . Rich, the Solicitor-General, was permitted to present himself in the witness-box and to swear falsely. . . . The Lord Chancellor: "You being by the opinion of that Reverend Judge, the Chief Justice of England, and of all his brethren, duly convicted of high treason, this Court doth adjudge that you be carried back to the Tower of London and that you be thence drawn on a hurdle to Tyburn, where you are to be hanged till you are half dead and then being cut down alive and embowelled and your bowels burnt before your face, you are to be beheaded and quartered, your four quarters being set up over the four gates of the City and your head on London Bridge." No one can deny that Lord Chief Justice FitzJames was an accessory to this atrocious murder,' p. 168, Vol. I.

'Chief Justice Montagu (1544) could not resist temptation, although

But it is when we contrast our legal system with that of our neighbours and rivals that we fully appreciate the disadvantage at which it places us. The conditions which have secured

sin was followed by remorse. In truth, he partook largely of the spoils of the Church, and in spite of his unhappiness he was reluctant to renounce not only the emoluments of his office, but the chance of further aggrandisement. . . . seeing how the Bar not only nodded submissively to his law, but laughed vociferously at his jests,' pp. 172, 174, Vol. I.

'Lord Chief Justice Wray (1589) between Crown and subject by no means showed the independence for which he was celebrated between subject and subject, yet his partiality and subserviency in State trials did not shock his contemporaries and are rather to be considered the reproach of the age than of the individual. Till Lord Coke arose in the next generation, England can scarcely be said to have seen a magistrate of constancy, who was willing to surrender his place rather than his integrity,' p. 208, Vol. I.

Sir John Popham (born 1531.) 'The extraordinary and almost incredible circumstance is that Popham is supposed to have continued in these courses after he had been called to the Bar and when, being of mature age, he was married to a respectable woman.' The courses were that 'he frequently sallied forth at night from a hostel in Southwark with a band of desperate character and planted themselves in ambush on Shooters Hill, or taking other positions favourable for attack and escape they stopped travellers and took from them not only their money, but any valuable commodity which they carried with them,' p. 210, Vol. I. . . . 'As Chief Justice the reproach against Popham was extreme severity. He was notorious as a "hanging Judge." . . . He left behind him the greatest estate that had ever been amassed by any lawyer; some said as much as £10,000 a year.'

'Sir Edward Coke, the framer of the 'Petition of Right,' incurred never-dying disgrace by the manner in which he insulted his victims when they were placed at the Bar of a Criminal Court. Here are some of his objurgations addressed to Sir Walter Raleigh: "All that he did was at thy instigation, thou viper." "I know thee, thou traitor!" "I protest before God, I never knew a clearer treason." "So I will lay thee upon thy back for the confidentest traitor that ever came at bar,"' p. 259, Vol. I.

'Coke when a law officer of the Crown showed a readiness to obtain convictions for any offences and against any individuals at the pleasure of his employers, and he became hardened against all the dictates of Justice, of pity, of remorse and of decency,' p. 266, Vol. I.

caste ascendancy, on the one hand ; an untiring solicitude for the public convenience, on the other. There a real Department of Justice ; here a hollow mockery. Great expense, uncertainty and delay

Our readers will observe that this is the man upon whose action in framing the Petition of Right lawyers have based the fantastic claim that Bench and Bar have secured our liberties ! In that famous episode it is true that Coke braved the displeasure of the Court and suffered loss of position in consequence, but it is equally true that his record gives him no sort of title to rank with such men as Penn and Hampden : to the former is largely due the Toleration Act of 1689, to the latter the vindication of parliamentary authority over taxation. Such are the dire straits of the Bar to produce a champion of popular liberties.

' Chief Justice Scroggs (1678) is looked to with more loathing than Jeffreys ; for in his abominable cruelties he was the sordid tool of others,' p. 9, Vol. II.

' 1685. Of the 841 prisoners whose lives were spared at the " Bloody Assizes " and who were transported as slaves to the Colonies many were sold on Chief Justice Jeffreys' own account, and long as was the voyage, and sickly, he calculated that from the state of the slave market, after all charges were paid, the price would average £15 a head ' . . . ' After his return from the West and receiving the Great Seal on the very day on which Alderman Cornish was hanged and beheaded in Cheapside, he caused Elizabeth Gaunt to be burned alive in Tyburn for having piteously given shelter to a fugitive who had befriended her,' p. 77, Vol. II.

' As you seem to be unfit for the Bar or any other honest calling, I see nothing for it but that you should be made a Judge,' said Chief Justice Jeffreys to Wright. . . . Soon the detected swindler, knighted and clothed in ermine, took his place among the twelve Judges of England,' p. 99, Vol. II.

' In the year 1687 Wright was made Chief Justice,' p. 100, Vol. II.

' Chief Justice Pemberton lent himself to compass the execution, under circumstances of revolting barbarity, of Dr. Oliver Plunket, titular Archbishop of Armagh (1681),' p. 39, Vol. II. In the case of Lord Shaftesbury the same Judge 'resorted to the most unworthy acts of intimidation and cajolery to obtain the finding of a true bill.'

' Jones untroubled by scruples was appointed to succeed Pemberton,' p. 46, Vol. II.

' Sir Robert Wright, if excelled by some of his predecessors in bold crimes, yields to none in ignorance of his profession, and beats them all in the fraudulent and sordid vices,' p. 95, Vol. II.

on one side of the narrow seas ; on the other, cheap, certain and prompt Justice. We adjure those readers who have neither grievances to ventilate nor axes to grind that they will consider whether a nation, labouring under such disabilities (as our legal incubus imposes), has an equality of opportunity in the struggle for existence with our more fortunate neighbours. We hear much of our comparative ill-preparedness for war : the truth is that we are equally ill-prepared for the strenuous rivalry of peace. Are we content to face the future with such a grievous handicap ?

Unless our people are the victims of gross deception, they will not remain devil-worshippers and sacrifice their vital interests at a shrine which inspires neither love nor respect. It behoves us, above all, to know that to which no reference is ever made by vested interest—we mean the immense progress made by our neighbours in rendering Justice accessible to the million.<sup>1</sup> In that respect we fail deplorably, and we are heading in the wrong direction. The commodity which we are pleased to call Justice is becoming more and more expensive.

That condition also obtains in the United States ; and there it is associated with others that are still more menacing. Our native Legalism offers every conceivable insult to Justice with the kiss of Judas. A Bar that knows no scruple scores triumph after triumph over a Bench whose subservience knows no limit. The resulting law-

<sup>1</sup> See Appendix E.



lessness<sup>1</sup> is without a parallel in any civilized community. The malady known as 'strict constructionism' is carrying its ravages into the most exalted regions.

The Supreme Court, by a majority of one, has recently declared that a Law was 'unconstitutional' which both Houses of the New York State Legislature had passed to remedy the insanitary condition of the city bakeries. Injury to the workers and danger to the public are as nothing to the doctrinaires of the Supreme Court when weighed against their reverence for technical formalism. The same fetish triumphed over reason when the New York Court of Appeals declared that the Legislature, in adopting the principle of workmen's compensation, had acted unconstitutionally.

When we find these decisions lauded to the skies as 'monuments of judicial learning,' we have the strongest internal evidence yet forthcoming of the solidarity of the American and English

<sup>1</sup> We read in *The Times* of March 15, 1912: 'Reports have reached Roanoke (Va.) that the Circuit Judge, the Sheriff, and the Attorney of Hallsville, a village in a remote section of the Blue Mountains, have been murdered in open Court. It appears that the murders were committed by a gang of moonlighters, one of whose members was on trial for keeping an illicit still. When the prisoner had been sentenced, his two brothers and several friends opened fire with revolvers. The Judge fell dead in his seat on the Bench at the first volley. The men then turned their weapons on the prosecuting Attorney, who dropped dead with several bullets in his brain. The Sheriff made a frantic effort to reach the men, but was killed before he had taken ten steps. Several of the jurors who had tried the case were wounded, and it is probable that one of them will not recover. Finally the assailants slowly backed out of the Court, revolvers in hand, and, mounting their horses, quickly disappeared. The Clerk of the Court and one of the jurors have since died.'

legal systems. They are indeed one and indivisible in essence, although adopting different local colour according to the environment. But the 'learning' which thrills lawyers with delight fills well-wishers of the Republic with dismay.

The tyranny of the dead hand is the craziest of all forms of ancestor-worship. We suffer from it more than any other race; our Judges, always harking back to authorities,<sup>1</sup> are more liable to

<sup>1</sup> The following report is from *The Times* of March 18, 1912. In a case heard in the Divorce Court on Saturday, the petitioner was Mrs. Hannah Pears. In her evidence she said: 'After their first child was born she had some stimulants and afterwards took to drink. She went to an inebriates' home, and while there the respondent went off with a Miss Helen Nash, who had been a servant with them. . . . She, the petitioner, had taken these proceedings so that her husband could marry the girl.

'The President.—And the case is brought solely with the object of promoting the interests of the adulterer?

'Mr. Grazebrook.—It is not done by way of collusion in any way.

'The President.—Do you want to marry again, Mrs. Pears? No, sir.

'The Rev. E. G. C. Parr, clerk in Holy Orders, said he married Mr. and Mrs. Pears at Northampton. . . . There seemed no possibility of Mr. Pears leaving the woman he had taken up with. That was the reason why he had advised Mrs. Pears to bring the suit.

'The President.—You persuaded her to get a decree on these grounds?—Yes, my Lord; so far as he is concerned, he has been with the same woman all the time. There had been no change in that respect.

'From the point of view of morals?—Yes, my Lord.

'Mr. Grazebrook.—The woman's petition has more in it than that; I submit that she is entitled to her release.

'The President.—She does not want it. She says she does not want to marry again.

'Mr. Grazebrook.—But there is the possible question of maintenance. She may be entitled to that.

'The President.—Yes, there may be all sorts of things you can theorize about, but they are not facts in this case. These are not her object, in fact. Her petition is promoted in the interest of morals.

'Mr. Grazebrook.—Is that a bad ground?

'The President.—What do you mean by bad?

be influenced by wrong decisions than by right principles. But with us the Legislature is supreme, and Legalist vagaries are subject to sharp correction, if they outrage popular sentiment. Not so in America, where the Supreme Court is the custodiar of the Constitution; the Legislature is powerless in the grip of its judicial interpreters, from whose lucubrations there is no appeal.

It follows that a momentous question is presented with the utmost clearness. Legalism—a pestilent emanation from the Bar—which is even now opening up vistas of infinite perplexity and confusion for the British Empire and has brought the administration of Justice throughout Anglo-Saxondom into dire discredit: Legalism, which makes molehills into mountains and strives to thrust the potentialities of the future into the

‘Mr. Grazebrook.—Is it a ground upon which the jurisdiction of the Court can be invoked?’

‘The President.—This petition seems to me to be brought for the relief of the adulterer.’

‘Mr. Grazebrook.—Is that the only thing operating in her mind?’

‘The President.—She said frankly that it was her sole object. The clergyman said it was solely on the ground of morals. Advantage is taken of the Court to do something in order to benefit the adulterer. You had better take a week or a fortnight to look up the authorities.’

‘Mr. Grazebrook.—But may it not be a case for the discretion of the Court?’

‘The President.—I have great doubts about the case, and you had better do as I suggest.’

‘Mr. Grazebrook.—As your lordship pleases.’

The absence of guiding principles, the necessity for a hunt across the centuries for the utterance of the most fallible of Popes, the consequent delay and uncertainty are all expressed in terms of expense. This is the penalty which we pay for our incorrigible indifference to the work of jurists and statesmen in neighbouring countries.

shrunken moulds of the past, is now seen firmly moored in the fairway of progress. Thus an issue is forced upon the American people; its solution will mark a turning point in the destiny of the Republic.

If anything can add to the absorbing interest of the situation, it is the reappearance of Mr. Roosevelt in the political arena. His remedy has come to be known as 'the recall.' It refers to decisions in the first instance, and not to Judges, except in extreme cases. With due restrictions and after full deliberation, Mr. Roosevelt would take a popular vote on decisions of the State Courts, which offended against the immutable principles of Justice. The popular verdict would be accepted as final and the decision reversed, subject only to the action of the Supreme Court of the United States. Considering the desperate disease of lawlessness from which the Republic is suffering, few of our readers will be disposed to place this recommendation in the category of desperate remedies. But super-sensitive vested interests have taken fright. The air is rent with shrill warnings that the very existence of the Republic is menaced. The special pleaders have turned their batteries on Mr. Roosevelt.<sup>1</sup> They perceive

<sup>1</sup> Against one such onslaught delivered in *The Times* of March 2, 1912, by a correspondent over the signature 'American Exile,' Mr. Arthur Lee, M.P., has offered a brilliant defence of Mr. Roosevelt. The curious in such matters will find his letters—admirable specimens of the cut-and-thrust of controversy—in the leading journal's issues of March 6th, 8th, 12th, and 16th. Attack and defence travelled far beyond the vexed question of 'recall.' They dealt with Mr. Roosevelt's attitude to England during the Boer War. On all points, the defence

no danger to the State in the wholesale acquittal of murderers at the bidding of strict constructionism ; but when their own parasitical state within the State is threatened, all the resources of an unscrupulous professionalism are mobilized to

is convincing. Mr. Roosevelt is proved to be a sincere friend of this country ; and he is to be congratulated on his champion. As an attempt has been made to create prejudice against the ex-President owing to his attitude to the Arbitration Treaty, it may be interesting to our readers to cite the passage in which Mr. Lee refers to the matter. *The Times*, March 16 : ' One word only about the so-called Arbitration Treaty, a poor emasculated thing which has just come to grief in the United States Senate and which will die unregretted in any of the three countries concerned. Mr. Roosevelt's opposition to it was certainly not based on hostility to England. He did not even object to the "no exceptions" Arbitration Treaty, which Mr. Taft and Mr. Asquith originally suggested—if it was to apply to England and America alone—"because," to quote his own published words, "the experience of 96 years has shown that the two nations have achieved that point of civilization where each can be trusted . . . not to take any action intringing the honour, independence, and integrity of the other." But he saw serious objections to any form of treaty "which it would be impossible to follow in making treaties with other great and civilized nations." This distinction, whatever objection may be taken to it by foreign statesmen and critics, at least reveals that instinctive and special friendliness towards the British Empire which "American Exile" is so anxious to deny.'

We are indebted to Mr. Lee for the following statistics of the United States judiciary : ' Excluding magistrates and Justices of the peace, there are in the United States nearly 4,000 Judges to-day. For New York City alone there are, besides Federal Judges, six Judges of the Court of Appeals, 50 Supreme Court Judges, and 64 others—120 in all. They are all elected, just as Congress men are, after nomination by the party machine and a contest at the polls, and for a limited term of years.'

An important contribution to the above controversy was made by Mr. Sydney Brooks in the issue of March 12. We cite the following passages : ' Mr. Roosevelt pointed his thesis with a telling quotation from one of Lincoln's speeches against the Dred Scott decision ; and throughout his Columbus address he took Lincoln's ground that the American people are the masters and not the servants of even the highest Court in the land, and are thereby the final interpreters of the

bewilder the public with fictitious dangers, hair-raising vaticinations and false issues.

Similar methods are being employed on this side of the Atlantic to prejudice <sup>1</sup> public opinion and secure Mr. Roosevelt's condemnation by enlisting against him the suffrages of the Bar, and of that important section of the Press which voices the sentiments and defends the interests of the Bar. President Taft himself, in all sincerity, makes a direct appeal to the same powerful order in America in these words :

constitution. His whole appeal to his audience was, "not to think of the mere legal formalism but to think of the great immutable principles of Justice, the great immutable principles of right and wrong."

These are the very last principles which the Legalists of either hemisphere desire to think of. Their power is immense, but although the war, now commenced, may show many fluctuations of fortune the result is not doubtful. The race which resisted strangling by the priest will not be stifled by the lawyer nor permanently hypnotized by the special pleader, charm he never so wisely. Mr. Roosevelt is the Luther of neo-Protestantism ; it will overcome Legalism if, perchance, Anglo-Saxondom's future is to be worthy of its past.

<sup>1</sup> The foundation stone of the American system is reverence for law and especially constitutional law. . . . 'The root politics—if not politics, policies—of the American people have been 'conservative since Hamilton embedded them in the Constitution, and Chief Justice Marshall, for thirty odd years, wove them into judicial form and made them absolute law for all time.'—*'American Exile' in the 'Contemporary' for March 1912.* Compare Mr. Choate's encyclical on the first page of Chapter VII. 'Absolute principles,' 'absolute law,' said in one case to be due, among other sources, to the Inns of Court (*mirabile dictu* !), in another to Judge-made law, are extolled as a mere mask to protect vested interests against the public welfare. The extract from '*American Exile*' is taken from the peroration of a long-drawn attack on Mr. Roosevelt, who is alleged to be threatening to subvert the Republic. The simple truth is that the lawyers' pseudo-respect for law and contempt for Justice has made the United States a byword and a reproach for lawlessness.

We are called upon now, we of the Bar, to say whether we are going to protect the institution of the judiciary and continue it independent of the majority, or of all the people.

These words may seem at first glance a deliberate attempt to confuse the issue. But large allowance must be made for the warping, refractive effect on the judgment of professional prepossessions and vested interest. The greatest men are subject to these hypnotizing influences.<sup>1</sup>

The independence of the judiciary is undeniably a matter of paramount importance. But we submit with all confidence that this invaluable independence may be impaired, nay destroyed, not only by coercion from without, but by hostile forces from within. The end and object of the judiciary being the administration of Justice, whatever consideration, operating upon the mind of the Judge, prevails upon him to relegate Justice to the second place, is a grave encroachment on his independence. Venality is such a consideration ;

<sup>1</sup> John Bright strenuously opposed the introduction of the Factory Acts. He and others, equally sincere, were so blinded by prejudices of various kinds that, although they were ever alert to champion oppressed nationalities abroad, they refused to recognize and remedy a form of oppression at home that was destroying hundreds of young lives.

The egregious couplet cited above (p. 245) did yeoman's service in this bad cause. For a long time the leader-writer treated it as Gospel truth. As a matter of fact, it contains more concentrated essence of falsity than almost any other couplet that has ever been written. Having regard to the promise of Mendelism and our enlarged grasp of powers which help to shape the future, we may yet be justified in exclaiming :

'How large, of all that human hearts endure,  
The part that purposed laws can cause or cure!'

enslavement to technical formalism is another. The disreputable consideration and the (locally and temporarily) respectable tradition are equally traitorous to Justice. One connotes a moral, the other an intellectual ailment. For some time past the judiciary in Anglo-Saxon countries has been exempt from the ravages of the former malady : they are chronic sufferers from the allurements of the latter ; they are not free to administer Justice. This is true to the letter of those whose allegiance is paid to the letter—the Parkeist majority.

If proofs are demanded, President Taft himself shall supply them, as regards America.<sup>1</sup> First, as to criminal causes. He has told us that ‘ the majority of the criminals in the United States escape punishment.’ That is a condemnation of Bench and Bar as concise and comprehensive as can be desired. The Bench sustains every fantastic objection of its parent, the Bar. The child is in happy unconsciousness of its dependence ; it knows no better ; its ideals are undeveloped. Turn to civil causes, and President Taft tells us that

‘ if we are asked in what respect we have fallen farthest from our ideal conditions in our whole Government, I think we would be justified in answering that it is our failure to secure expedition and thoroughness in the enforcement of public and private rights in our Courts.’

<sup>1</sup> The foregoing chapters and their appendices provide abundant proofs as regards this country and India.



In guarded and diplomatic phrasing, there is an elaborate admission that the Courts are suffering from a perfect orgy of technical pedantry which sacrifices the soundest cause to the most trifling defect of form. President Taft's appeal to the Bar to protect the independence of the judiciary is pathetic. By his own admission its independence has gone. Otherwise, why is it failing ignominiously to administer Justice either on the criminal or the civil side? President Taft is making frantic attempts to lock the stable door after the steed has been stolen: by whom do you think? By the Bar.<sup>1</sup> O laughable, pathetic jumble of Legalism!

For this creeping paralysis of Justice Mr.

<sup>1</sup> On *a priori* grounds it was to be expected that the Bar in Anglo-Saxondom would gradually but surely efface the Bench. Our law is by its nature unprogressive. Our perpetual tinkering and attempts at codification by shreds and patches are sufficient to satisfy popular clamour, but are not progress in a worthy sense. The sectional character remains; the distinction between law and equity obtains; the watertight compartments persist; there is no attempt to base the whole upon broad principles which are consistent and interdependent. Consequently the reference to authorities is necessary; these are often of doubtful relevance and leave an undesirable degree of latitude to the Bench. These are conditions, one and all, which occupy much time and multiply uncertainty and expense, thus unduly favouring the Bar and levying tribute on the public. The Bench, being one in training and sympathy with the Bar, accepts this as part of the order of nature. Bar and Bench become two limbs of a mutual admiration society. But as nothing stands still, when progress is impossible degeneration is inevitable. The native ingenuity of the Bar is encouraged by the Bench. We have seen the effect of this corrosive action on statutes. It is distinctly noticeable in England; it is worse in India, from causes explained in a previous chapter; it is worst of all in the United States, where the lawyer is above the Legislature.

Roosevelt proposes a remedy. It is not ours.<sup>1</sup> But it is an honest endeavour to solve a terrible problem. Meanwhile what are his opponents doing towards a solution? In imitation of our<sup>2</sup> special pleaders, they are invoking great names whose possessors their congeners of a bygone day did not scruple to denounce. They are babbling of absolute laws and a Constitution, on their interpretation of which they are prepared to crucify good citizens while Cain and Barabbas are let loose on society.

And, truth to tell, in the matter of setting criminals at liberty, it is nothing short of a tragic circumstance that India is following the United States on the road to disintegration. The pro-

<sup>1</sup> Our remedy for the ailment of Anglo-Saxondom is a specially trained judiciary, as opposed to a body of Judges recruited from the Bar. But as the Judges in the United States are elected by popular vote from among members of the Bar, a difficulty—quite possibly insurmountable—presents itself in applying this policy to that country. Would the people be persuaded that their true interest lay in forgoing the doubtful privilege of electing the Judges and leave their selection to the Department of Justice? There must necessarily be a real Department of Justice in which the public has complete confidence. This condition is indispensable, because young students of law, absolutely unknown to the public, cannot be made the subject of a popular vote; they must be taken on trust, that is, in reliance on the capacity of the Department to choose the right men. We accept our military officers on similar lines. Mr. Roosevelt may not be satisfied that his public is prepared for such sweeping changes. Like another great statesman, M. Thiers, who recommended the Republican form of Government, 'because it divides us least,' Mr. Roosevelt advocates a compromise.

<sup>2</sup> The varying attitude of our Legalists of different generations to our really great Judges recalls that of the Greeks to Homer:

'Five cities statues raised to Homer dead,

- Through which, when living, he had begged his bread.'

gressive paralysis of the Barrister-Bench is becoming more pronounced. Its independence has been long filched away by the domination<sup>1</sup> of its progenitor, the Bar. And now its utter bankruptcy in independence and credit has been proclaimed to the world. In despair at the spectacle of certain politico-criminal trials dragging their slow length along from month to month and year to year, the Government of India was driven to intervene. On its initiative and through its emissary, a bargain is said to have been struck, and prisoners against whom there was strong evidence were assured<sup>2</sup> of an acquittal, if they

<sup>1</sup> In Lord Campbell's *Lives of the Chief Justices*, Vol. II., p. 398, we read: 'Lord Mansfield was free from the besetting sin of being unduly under the influence of counsel, either from favour or from fear.'

Commenting on the Stoddart case in its issue of May 29, 1909, *The Times* has the following: 'More rambling and inaccurate reminiscence of evidence, confidential soliloquies and uncritical repetition of the arguments of a favourite counsel, will not suffice.'

<sup>2</sup> The following extracts are from a leading article that appeared in *The Times* of April 6, 1912. The article is entitled 'The Administration of Justice in India.' It is a weighty indictment of our legal system. The article begins: 'Justice moves with leaden feet in India. The announcement that the Dacca conspiracy case has been concluded in the Calcutta High Court this week directs attention to a trial which the public have doubtless well-nigh forgotten. It began nearly two years ago. . . . With the privacy of both the Government and the High Court a distinguished emissary saw the accused men in gaol, and under authority informed them that if they pleaded guilty they would be acquitted. They did so plead and were at once released, although the evidence against them was grave. . . . We find reason to believe that the whole system of the execution of the law, the administration of Justice, and the working of the Courts, not only in Calcutta but throughout India, needs to be subjected to close and systematic inquiry.'

In view of the importance of the subject, the whole article is given, with acknowledgments, in Appendix U.

pleaded guilty. This astonishing compact, which is reminiscent of the worst phases of our legal history, was carried out to the letter. And so the Barrister-Bench has closed a period of deepening discredit and pitiable weakness by committing suicide to save itself from slaughter.

The Legalist world, a tissue of counterfeits and contradictions, is naturally the home of surprises, and we find it providing a vindication for Mr. Roosevelt's proposals. In the United States and in India, the weakness of the judiciary may well inspire the gravest anxiety in all true friends of Republic and Empire. For this condition Mr. Roosevelt's recommendations provide a corrective, whereas the intervention of the Government of India is an aggravation of the evil. It cannot fail to prove an encouragement to lawlessness. Disheartened<sup>1</sup> to the verge of despair for years past by the reversals of the High Courts, the lower Courts are now offered the spectacle of a wholesale betrayal of Justice concocted by the Government, in order to mask<sup>2</sup> the helpless floundering of the higher judiciary in a quagmire of Legalism. The ivy is slowly but surely strangling the oak.

We are not confronted with an unfortunate episode which may not recur: on the contrary, it is the culmination of an age-long<sup>2</sup> process. Arrogant vindication of professional privilege

<sup>1</sup> See Sir J. D. Rees' letter in Appendix H.

<sup>2</sup> See heading to Chapter VIII.

and prerogative in exalted <sup>1</sup> quarters have supplied an armoury to astuteness and disaffection. These weapons, thrust into skilful hands, are being used with deadly effect for two main purposes. The first is to humiliate and render impotent the real administrators of Justice, the Civilian-Judges, one section of whom finds convictions quashed; the other, minority judgments ignored: second, to heap discredit on the British power through the Barrister-Bench, whose weaknesses are artfully exploited while exhausting all the formulæ of profound respect. The microscopists of the Inns of Court are provided with a succession of fine points, round which dialectical fireworks coruscate as weeks wear to months and months to years. Both purposes have succeeded beyond expectation. The Civilian-Judges are paralyzed. The Babus and the Bar are masters of the situation. The Nemesis of irrational privilege has overtaken us. The wheel has come full circle.

This is pre-eminently an occasion when it is wise to learn from adversaries. The methods which recommend themselves so strongly to the disaffected and self-seeking are a contra-indication of the policy which makes for the credit and stability of the Empire through a fearless administration of Justice. That consummation is possible under one condition, that the judiciary shall be immune from the blight of the Bar. The Civilian-Judge fulfils that condition. The Bar knows it, hence their covert or open hostility. The

<sup>1</sup> See headings to Chapters I. and II.

oppressors, in Lord Curzon's phrase, 'the sharks in human form that prey upon the unhappy people' know it, hence their virulent hatred. The dumb millions of Hindustan are vaguely aware of it, hence their confidence. Public policy cries aloud for the gradual extension of the institution of Civilian-Judges; but under existing conditions at home it will fall upon deaf ears. The attitude of the Ministry to Legalism in India leaves no doubt on the subject.

The proverbial luck of the British Empire has never been conspicuous in the legal domain; nor is there promise of a change in this respect when we find Lord Morley placing his great gifts at the disposal of reactionary obscurantism and offering a defence or apology, from his place in the House of Lords, of some of the worst legal abuses in India. The spectacle is a bitter disappointment to those who admired the genius of the writer and entertained the highest opinion of the statesman.<sup>1</sup> The country has reason for poignant regret. All

<sup>1</sup> In the House of Lords on December 17, 1908, Lord Morley, discussing the Summary Jurisdiction Bill (Indian Speeches, 1907-1909), said: "I cannot imagine anybody reading the speeches, especially the unexaggerated remarks of the Viceroy and the list of crimes perpetrated and attempted, that were read out last Friday in Calcutta—I cannot imagine anybody reading that list, and thinking what they stand for, would doubt for a single moment that summary procedure of some kind or another was justified and called for. . . . You must protect the lives of your officers. You must protect peaceful and harmless people, both Indian and European, from the bloodstained havoc of anarchic conspiracy."

These words were spoken three years ago. What mysterious cause is responsible for this catastrophic change of attitude? The stultification of the lower Courts by wholesale reversals is now accepted and even defended.

the omens are discredited. It is a national bereavement. Lord Morley is the last and greatest recruit to the bubble-blowers<sup>1</sup> of Legalism.

If these were ordinary times, we should despair of law reform. But these are not ordinary times. If we look around us, we shall find that all values are being sternly challenged. To this rule there is no exception. It is Nature's inexorable law. Through its action all existing types of life and civilization have been developed and untold myriads of failures eliminated. Instead of whining because the eternal struggle will not be suspended for our behoof, let us accept it with all that it connotes, rejoicing like a young man in his strength. We hear occasionally that the British Empire is a weary Titan. We deny it. The race has the exuberant vigour of a mighty youth. But it is most assuredly subjected to a cruelly unfair handicap. It is being cabined, cribbed, confined by vested interests. It is far from enjoying equality of opportunity with its neighbours and rivals in the vital domain of Law.

This is a matter of paramount importance in the struggle that is impending, under conditions

<sup>1</sup> Referring to the extraordinary circumstances recounted in the leading article of April 9, 1912, *The Times* continues:

'Lord Morley thought to excuse these wholly irregular proceedings, on the plea that the trial would have lasted a long time, and would have "created a bad impression throughout the country"; and he invited the House of Lords to condone this compounding of felony because, on their return to their villages, the accused "were sent for by an eminent Hindu gentleman, who gave them a severe lecture on loyalty," and so the policy of pills for earthquakes is being adopted in India.'

more severe than ever occurred in our past history. Our right and title to our present place in the sun is challenged. Right and title are only guaranteed by might, and might depends absolutely upon efficiency. If the truth must be told, we are not an efficient nation. Nor can a high level of efficiency be attained under our present legal system. If that conviction has not been borne in upon our readers, the foregoing chapters have utterly failed of their purpose.

But notwithstanding the manifold defects in our presentation of the subject, we venture to entertain a hope that those who have followed us so far will carry away with them, and ponder over, a few leading impressions which may be appropriately condensed in some brief sentences.

The Anglo-Norman legal system was imposed upon us by an autocrat. It was never intended to contribute to the public welfare. On the contrary, it deliberately and ostentatiously subserved <sup>1</sup> the interest of the conquering clan. It was cruelly unjust and oppressive to the natives of this country. They gave proof of deep resentment on two occasions <sup>2</sup> by sacking the legal strongholds.

<sup>1</sup> In Campbell's *Lives of the Chancellors*, Vol. I., p. 29, we read: 'To our Anglo-Saxon ancestors we may trace whatever has most benefited and distinguished us as a nation . . . (p. 37). There is hardly to be found such a striking instance of race tyrannizing over race as in England during the reigns of the Conqueror and his immediate descendants. . . . (p. 42). Lord Chancellor Giffard had heartily concurred in the oppression of the Saxons in the early part of William's reign and had declared that they were to be considered aliens in their native land, and had assisted in the measures for upsetting English Law and extirpating the English language.'

<sup>2</sup> In the XIV. and XV. centuries



These are the Inns of Court. They are still the headquarters of Legalism, of which the core and marrow is the cult of advocacy. Having captured the Bench, the Bar proceeded to attribute to the judiciary a larger measure of infallibility than that with which the sacerdotalist credits the Pope. Capricious decisions <sup>1</sup> are followed blindly : and so an insidious process of Law-making by Judges is always in progress. Statute Law is subverted <sup>2</sup> by the same process. A judiciary recruited from the Bar worships at the shrine of technical formalism, which it mistakes for Justice. These grave defects are potent sources of confusion, uncertainty, delay and expense. Combined with the abuse of the jury system <sup>3</sup> they are the main factors in achieving the ascendancy of the legal profession.

That ascendancy is maintained and extended by opposing <sup>4</sup> change, by opposing codification, by opposing the extension of the jurisdiction of the County Courts, <sup>5</sup> by opposing the establishment <sup>6</sup> of an Imperial School of Law, by

<sup>1</sup> Possibly 'the reverberations of physiological emergencies.'

<sup>2</sup> Witness the law of inheritance and recently the treacherous use of the pseudo-principle of 'consideration' to undermine the Gaming Act.

<sup>3</sup> See Chapter IV. and Appendix D.

<sup>4</sup> 'Law Reporter,' in an article in the *National Review* for October 1909, says: 'The Bar opposes any real change. The prosperous minority are too busy and too materialized to care for or devise improvement; the majority are too depressed or too hopeless to make any attempt.'

<sup>5</sup> 'The Bar Council and the Northern Circuit had sent him strongly worded protests against the proposed new system.'—*Lord Halsbury in the House of Lords*. 'The Times,' July 27, 1909.

<sup>6</sup> See Chapter III.

ignoring<sup>1</sup> the progress and experience of our neighbours, by hugging medievalism and bestowing extravagant encomiums on 'English Justice.' The great majority of the Judges, by failing to discountenance such tactics, incur a certain degree of responsibility for them. It is difficult to apportion the blame between the weakness<sup>2</sup> of an individual and the vices of a system. Considered together, they explain, without justifying, the failure of the Bench in India and the United States: they enable us to realize the handicap to efficiency in England.

Thus we find that the Anglo-Norman legal chaos retains to this day a large measure of the character imprinted upon it by our invaders. If it has ceased to subserve the purposes of despotism, it continues to minister to the glorification of a caste rather than to the welfare of the

<sup>1</sup> 'Although we should not like to see your institutions introduced into this country. . . .' Speech of a Judge at a dinner given in honour of a group of German Judges, on the occasion of their recent visit to this country. Apparently the speaker was unaware of the fact that our methods of medievalism in law are the chief ground upon which our neighbours base the belief in our decadence.

<sup>2</sup> Here the question is relevant, Are our Judges justified in following, as regards Law, the cynical maxim of the Roman *bon vivant* as regards morals? 'Video meliora proboque, deteriora sequor.'

The entire acquiescence of ninety-nine-hundredths of our Judges in the iniquities of our legal system can only be contemplated with amazed melancholy. The blight of the Bar, the infirmities of age, and the insidious influence of vested interests are important factors in this phenomenon.

In the article cited above in the *National Review*, October 1909, the writer continues: 'The Judges are the spoiled children of the State. After years of overwork at the Bar, at the age usually of about fifty-five, they go to the Bench, and if after a few months' work they break down, they receive an enormous pension.'

State. It is oppressive and parasitical.<sup>1</sup> It is increasingly inaccessible to the poor, whilst it sells counterfeits of Justice to the rich. Those grievous defects are a source of profound demoralization and an insurmountable obstacle to national efficiency.

We have said that these are not ordinary times ; those who are alive to the signs around them perceive features of promise. We trust that the select minority of our judiciary, who cherish the great traditions, will give the world a signal example of self-sacrifice and head the neo-Protestant movement in this country. The woman's vote will secure a reversion to the Roman Law of inheritance ; it is said to have had that effect in

<sup>1</sup> We have referred more than once to the profound indifference of our law to any interests but those of its exponents. The most recent instance is contained in the following letter which appeared in *The Times* of April 9, 1912. It is entitled 'Law Costs Abroad.' The writer asks : ' Can any of your readers who are versed in international law suggest an adequate reason as to why Great Britain should have abstained from taking part in the International Agreement relating to law costs, as discussed at the Hague Conference ? By virtue of this agreement the citizens of participating States are placed on the same footing as native litigants, while British subjects are compelled to deposit very much larger sums in respect of pending lawsuits. In Germany it is approximately three times as much. Whatever object there may have been in Great Britain's abstention, it could hardly have been the interests of British traders.'

This abstention has the appearance of being part and parcel of the policy of retaining a Chinese wall round the medievalism of this country. It is another point of resemblance between Legalism and Clericalism. Both endeavour to exclude the disturbing influence of free interchange of opinion and experience with other nations. In a foregoing chapter will be found a reference to a similar abstention on the part of our legal Manchus from an International Conference on the laws relating to marriage. These are betrayals of the public welfare. 'Per viltà fece il gran rifiuto.'

New Zealand. As a matter of fact, the Sister-State revised its Law of inheritance in 1906. Mr. Roosevelt's fight against enslavement to the letter of the Law in the United States is also of good augury. But our confidence in the possibility of escape<sup>1</sup> from the thralldom of Legalism rests mainly on the fact that our people have never accepted Anglo-Norman Law with cordiality. It has always excited and it inspires at this moment a deepening mistrust. When the Referendum gives the nation an opportunity—the first in our history—of registering replies to such queries as the following, there may possibly be surprises for the party of reaction: 'Shall the duties of solicitor and barrister be merged in one individual?' 'Shall we give candidates for judicial functions a special training distinct and separate from practice at the Bar?' 'Shall the number of our judiciary be increased to the continental standard, and their emoluments reduced to the scale of those received by their Continental *confrères*?' 'Shall the Long Vacation be reduced to

<sup>1</sup> The way of escape is by rehabilitating the study of Law and treating it as a matter of national and Imperial concern, not as a mere preserve for the aggrandisement of the Bar. In his introduction to *Germany in the XIX. Century*, Viscount Haldane writes: 'Orderliness becomes easy when first principles have been clearly defined.' Precisely. The maxim is specially relevant to the study of Law. The Germans have shown us the way to evoke order from chaos and a reasoned system from empiricism in legal matters. Viscount Haldane is an authority on German methods in philosophy, in war, and in law. Surely we might expect a lead from him on the path towards cheap Justice which is such a boon in Germany. Will he not at least exert his authority as a member of the Cabinet in mitigating the obstruction complained of in the footnote to the previous page?

half its present duration ?' ' Shall all and every intermediary between the State and the People in the legal domain be forthwith abolished ?' ' Shall we have a complete system of codification on the Continental pattern ?' ' Shall the long detention of prisoners before trial, and the Circuit system, cease and determine ?' ' Shall our Indian Empire be sacrificed<sup>1</sup> to the Babus and the Bar ?'

We cherish the fervent hope that these queries, or some of them, will elicit such responses as shall carry conviction to the minds of the most recalcitrant that a new era has opened : that our legal system shall not always present to the eyes of Europe the spectacle of a belated fortress of the methods of medievalism ; and that the present legal libraries, in so far as they deal with the decisions of departed popes, shall be relegated to the limbo of other instruments of pillage and exaction—their kindred of a bygone day. The foregoing pages are a feeble effort to prepare an instructed body of public opinion which shall compel attention to far-reaching measures for ensuring national efficiency as opposed to the petty tinkering of the past. ' Then shall Justice, man's mightiest man-child, leap beneath the Future's breast.'

<sup>1</sup> See Appendix U.



# APPENDICES

## APPENDIX A

In an after-dinner speech at the Mansion House on June 19, 1909, Lord Chief Justice Alverstone was reported to have spoken as follows :—

‘To what did they attribute the confidence which was felt in the judiciary of the Empire? In his opinion it was, to a large extent, owing to the fact that their ranks were recruited from the experienced members of the Bar.’

Quite possibly Lord Alverstone is correctly interpreting the opinion of the English public, who find in the mere fact of their being experienced members of the Bar an especial reason for respecting our Judges. But we suggest, with all respect, that the public would be in a better position to justify the faith—or the fetish—that is in them, if they had opportunities of comparing the work of Judges who have, with the work of those who have not, practised at the Bar. The Anglo-Indian public have had such opportunities.

According to Marchant, the following offices can only be held by barristers :—

Lord of Appeal in Ordinary.

Judge of the Court of Appeal.

Judge of the High Court.

Judge of the Salford Hundred Court.

Chairman of Quarter Sessions.

Deputy Chairman of Quarter Sessions.

Master in Lunacy.

Registrar in the Land Registry.

Judge of the Provincial Court of Canterbury.

Judge of the Provincial Court of York.

Conveyancing Counsel to the above Courts.

County Court Judge.

Deputy County Court Judge.

Assessor of the Liverpool Court of Passage.

Revising barrister.

Secretary to the Lunacy Commissioners.

Stipendiary Magistrate for a Borough.

Deputy Judge of the City of London Court.

Deputy Judge of the Mayor's Court.

Recorder of a Borough having a separate Court of Quarter Sessions.

Deputy Judge of the Salford Hundred.

Deputy Judge of the Borough Civil Court.

Examiner of the High Court.

Common Serjeant of the City of London.

For yet another list of appointments, barristers and solicitors are jointly and exclusively eligible.

In *The Times* of October 7, 1910, we find the usual notice under the heading 'The Opening of the Law Courts.' 'There is to be a special service at Westminster Abbey on Saturday, 12th October, which the Lord Chancellor and His Majesty's Judges will attend. A certain portion of the space is reserved for barristers and their friends.'

Here we have an interesting link with the future. It is universally admitted that if any function in the worldly domain partakes of a sacred character it is the administration of Justice. That the Bar should be associated with the Bench on such an occasion is an insular eccentricity, of which 'King's Counsel' and 'Lord Advocate' are kindred indications.



In other countries, barristers are accounted a necessary evil. They lie under the suspicion of being always ready to act the part of the devil's advocate for a consideration. That is no reproach in this country. Almost anything is fair if it secures a verdict.

What we have called the link with the future is that the barristers of to-day are the Judges of to-morrow. We may safely predict that when the public can be persuaded to give a little attention to legal matters and learn to what extent they are lawyer-ridden, they will insist on breaking this link in their fetters and insist on the training of a body of Judges who shall devote their best—not their declining—years to the administration of Justice as a protection against the Legalism of the Bar.

Wednesday, December 14, 1910, was the centenary of the re-establishment of the French Bar by Napoleon I. We are indebted to *The Times* of the 12th for the following brief sketch of the French Bar:—

‘It seems that the name “avocat” occurred as early as the 6th century. It was at first conferred upon the representatives of churches, abbeys and bishoprics in the Civil Courts. Under Charlemagne advocates appear as “clamatores” or “causidici.” Early in the 13th century the Kings issued Decrees regulating the profession. In the “établissement de Saint-Louis” “avocats,” “avant-parliers” and “amparliers” are mentioned. In 1535 the order crystallized into definite shape, and in that year it was ordained that before a candidate could be “called” he must graduate “in altero iurium.”

‘The French Bar was shorn of its privileges in 1790. The Decree of September suppressed the corporation (ci-devant appelés avocats). In their place there remained “defenseurs officieux.”

‘It is to be noted that the line of demarcation between Bench and Bar in France is not less definite and precise than in Germany.’

The French being a more vocal, not to say a more voluble, race than ourselves are peculiarly well fitted for taking their own part in the Court of law. Consequently the cult of advocacy has never attained to the proportions that are characteristic of this country. Our lively neighbours do not subscribe to the article of faith which declares that 'He who is his own lawyer has a fool for his client.' In a case reported in the *Daily Express* of February 23, 1911, the client may be assumed to have held a diametrically opposite opinion. That is to say, the condition of the client is still less gracious who is represented by an advocate. Such regrettable irreverence is unknown in England and such an incident as this is unthinkable: 'In one of the Law Courts at Montbrison, a lady who was dissatisfied with her counsel's presentation of her case lassoed him with a boot-lace and pulled hard. The unfortunate advocate was black in the face when he was rescued.'

It is a healthy symptom that criticisms of the Bar are appearing occasionally in unexpected quarters. The following extracts are from an article in the *Daily News* of April 25, 1911, over the signature 'C. Stanhope.'

'What is the Bar? The Bar is the Legal Trade Union. It was rather ironical for the Barristers in the House of Commons to denounce the Trades Disputes Act as placing Trades Unions above the law, considering that they themselves are members of a Union which by a strange paradox is outside the law.

'A barrister cannot be sued for negligence in his professional duties. In this respect he is unlike any other professional man. . . . The fee is taken, the work is not done, and there is no redress for the lay client. . . . The barrister's clerk and the solicitor's clerk have a cosy chat as to the means of the client. One instance which came under the present writer's notice concerned a very eminent counsel. He had a brief delivered to him

in a complicated arbitration, with a marked fee of 300 guineas. The learned counsel in question appeared in certain preliminary proceedings and no point was raised as to the amount of the fee. Then two days before the actual hearing of the case was fixed, the brief was brought to the solicitor's office, with the intimation that Mr. So-and-So could not conduct the case unless he received an additional fee of 200 guineas.

'The solicitor happened to be an independent man. He took back the brief, delivering it to another counsel at a fee of 300 guineas. But this counsel, being unable to master all the details in a couple of days, urged a settlement, which was practically forced upon the client. Transactions of a similar kind are of frequent occurrence in the Temple and at the Assizes. . . .

'The following is another example : Mr. Snubbin, K.C., has accepted a brief at twenty guineas. Mr. Hothead, K.C., is briefed on the other side at forty guineas. The day the case is imminent for hearing, Mr. Snubbin's clerk calls upon the solicitor to say that Mr. Snubbin cannot fight the case for a fee of less than forty guineas. The solicitor must inform the client of this objection, and he must generally advise him to pay the extra fee or run the risk of losing the case. . . .

'Admission to the Bar is limited by the heavy entrance fees to the fairly well-to-do and rich classes. The Bar is the material from which the Judges are drawn. The opinions of the masses of the people, as things are at present, rarely receive fair consideration from the Judges. There is nothing more irritating to an impartial observer than to watch the courtesy with which a wealthy witness is treated by a certain Judge, and the hectoring tone adopted by the same Judge to a witness from the clerk, petty tradesman, or working classes : and the same spirit is exhibited by many other learned Judges. The confining of the Bar to the middle and upper classes has created that class administration of Justice which is felt

so strongly among the trade-unionists and the general body of the working classes.

‘The dissatisfaction arising from political and class bias in the administration of Justice has assumed grave proportions in the last few years, and action of some kind will have to be taken to restore the confidence of the masses in the impartiality of the Judges. The whole system of the appointment and training of the persons holding judicial offices needs drastic reconstruction. The fees for admission to the Bar should be reduced and the many expensive forms and ceremonies, by which democratic influences are repelled, should be swept away as relics of bygone days. . . .

‘The administration of the Bar might be subjected to a public investigation, which could best be secured through a Royal Commission, upon which laymen were preponderantly represented. The Bar, so far from oiling the machinery of Justice, has clogged it with every kind of obstacle.

‘The doing of Justice should be a sacred duty in any community; and it is deplorable that in England this duty has been entrusted to men whose training is one routine of class prejudice and educational cynicism. Until the constitution of the Bar is altered, the administration of Justice will steadily drift from bad to worse.’

In the House of Commons, in the debate on the Trade Union Bill as reported in the *The Times* of May 31, 1911, Mr. Ramsay MacDonald spoke as follows:—

‘Before they laid a single stone of the fabric they went to two of the most eminent lawyers in the country, Sir Edward Clarke and the present Lord Chancellor, and asked their opinion. They told them that they proposed to do certain things, and asked for the considered opinion of these two lawyers whether these things were legitimate under the Trade Unions Act. They received that considered opinion, saying that everything they

proposed to do was perfectly legal and well within the scope of the Acts.'

This refers to the policy which was upset by the Osborne case. So much for counsel's opinion.

In 'Anomalies of English Law,' by Mr (Hester of the Middle Temple, we read under the heading 'Client, Solicitor and Counsel': 'Usage has made it necessary, except in criminal court cases, for a client to go to a solicitor, who in due course goes to counsel, if the matter comes within the province of counsel. This intermediate process is doubly absurd in practice, when it is remembered that counsel does not always confer with the solicitor himself, but only with the clerk. It is suggested that the cumbersome necessity for a client to go to a solicitor before he can obtain access to first-class advice is an anachronism at this time. The inaccessibility of all persons has greatly diminished in recent years, with the result that to keep up the system of inaccessibility in respect of counsel is often hard on client and on counsel. It is one of the greatest barriers to the Bar as a means of livelihood. . . . Why should professional etiquette exist placing the profession to which it refers at the mercy of another profession quite separately and independently constituted?'

The obvious answer is that by insisting on employing two men, more tribute can be collected from litigants.

Dr. Gerland, of Jena, in his work on 'Die englische Gerichtsverfassung,' devotes much space to a study of the Bar. We extract a few passages:—

'Barristers,' he says, 'take up the practical side of their profession without adequate theoretical instruction. Working in the chambers of other Barristers when they have no work themselves, they learn in and through practice. But the objections to this course are manifest. Absorbed in cases as they occur, the English Barrister

can only master his work as he learns it. Experience must take the place of study. But it must not be forgotten that experience is necessarily limited. Mere knowledge of cases produces specialists in practice; and most English Barristers are, in fact, specialists in a limited domain. Now, the disadvantages which such an imperfect system brings with it show themselves in two ways: first, the number of those who fail in securing work is disproportionately high. In my opinion there cannot be a doubt that the number of unemployed Barristers, estimated as 25 per cent., is accounted for by the fact that it is not everyone who has the ability to train himself by a study of cases. A system of legal training must always be based upon the middle line. Genius will always force a passage and hold on its own loftier way. But nothing is more erroneous than a method which is only suitable for exceptional individuals. Consider, too, how genius itself is hampered and clogged by English law. Instead of receiving the fullest and most comprehensive instruction from the beginning, one is obliged to glean information tediously from case to case; and to shape that information systematically is a faculty possessed by none but the rarest men. And so we come to the second evil resulting from inadequate instruction. *To the average Barrister a comprehensive survey of Law as a whole is always wanting.* He will never see anything but single incidents in the phenomena of Law; but the connection between them, their relations, their interaction and interdependence will remain hidden from him. And thus, while the scope of legal science will not be mastered, the predominant factor will ever be the cult of precedents *whose last and deepest reason in England, as heretofore, is the insufficiency of one's own judgment*; and so a really systematic science depending on root principles is impossible. That it is as good as non-existent in England (although there are famous exceptions) is explained by the fact that jurists

are not scientifically trained. *Without systematic instruction, a rational system of legislation is impossible.* And the fact that England has no reasoned legal system, no codification for which people have so long called in vain, is owing to inability to achieve codification for the want of sufficient instruction. Here it is seen that the question of training English Barristers is by no means confined exclusively to the working of the Bar. On the contrary, it has far-reaching effects, as will be appreciated when we recognize the exceptional importance of the Bar in England. . . . Every Judge was a Barrister and every Barrister is a potential Judge. . . . Such an evolution of Law, as we have adumbrated, demands wider horizons and requires a grasp of clearer principles than any to which unsystematic training can ever attain. In the constitution of Law, just as in the constitution of the physical world, science understands the particular only as part of the universal.'

The learned Professor maintains that Law is entitled to a place in the circle of the sciences. This contention is not universally accepted, even in Germany. But supposing we are content to assign a more modest position to Law—that of a thoroughly co-ordinated system—it is a violent transition from that to our miscellaneous collection of oddments picked up at a jumble sale. So well does this thing of shreds and patches suit the reigning oligarchs that they oppose the formation of a School of Law, according to a speaker at a meeting of the Law Society, to whose remarks reference is made in the text.

The great Dr. Arnold writes to Mr. Justice Coleridge in 1837: 'In proportion to my reverence for the office of a Judge is, to speak plainly, my abhorrence of the business of an advocate. . . . I have been thinking, in much ignorance, whether there is any path to the Bench except by the Bar . . . that is without that painful

necessity of being retained by an attorney to maintain a certain cause and of knowingly suppressing truth, for so it must happen, in order to advance your argument.'—*'A Chance Medley.'*

In 1825 a Judge said : ' The speech of a counsel is privileged by the occasion on which it is spoken ; he is at liberty to make strong, even calumnious, observations against the party, the witnesses, and the attorney in the case. The law presumes that he acts in discharge of his duty, and in pursuance of his instructions, and allows him this privilege, because it is for the advantage of the administration of Justice that he should have free liberty of speech.'

' In 1883 the Court of Appeal went even further. In *Munster v. Lamb* a solicitor defending before the magistrates against the prosecutor (a barrister) imputed immorality to the latter, who brought an action for defamation. But it was decided that no action lies against an advocate for defamatory words spoken with reference to, and in the course of, a trial, although they are uttered by him maliciously and not with the object of supporting the case of his client, and are uttered without any justification or even excuse, and from personal ill-will or anger towards the person defamed, arising out of a previously existing cause, and are irrelevant to every issue of fact which is in dispute before the Court. Counsel, said Lord Esher, ' more than a Judge, infinitely more than a witness, wants protection on the ground of benefit to the public.'—*'A Chance Medley,'* p. 102.

Those who would pass lightly over Lord Brougham's encyclical, cited as headings to Chapters I and II, and urge that he was carried away by the exuberance of his own verbosity, are invited to consider the decisions of 1825 and 1883. These are deliberate judicial utterances. Our readers will observe, too, that on the second occasion counsel's privileges and prerogatives are placed distinctly



higher than fifty years before. In this *crescendo* of pretension, what are we to expect ? In the long history of Brahminism and Sacerdotalism, there is no better instance of a predominant caste conjuring with words. When our Legalists prate of the 'benefit to the public,' they mean 'the benefit to the profession.' The parasite mistakes his own interest for that of the host. Self-deceived, he deludes the public. We invite our readers to reflect on the influence of such pernicious pretensions on the native Bar in India. Our Judges at home, that is the Parkeist section of them, have sown the wind ; we are reaping the whirlwind. At the risk of being accused of 'damnable iteration,' we repeat that our ideals of Justice are low, owing to our deplorable legal history. Otherwise, how is it possible to explain the attitude of Judges who hold that the administration of Justice can be subverted by admitting statements which are essentially unjust, spiteful, irrelevant, offensive and possibly false ?

## APPENDIX B

Our readers will do well to notice the attitude of the Bar and its friends to any proposals for Law reform. The following extract is from *The Times*, of July 27, 1909 :—

'The House of Lords went into Committee on the County Courts Bill. On Clause I, Lord Halsbury moved the rejection. (It gives County Courts unlimited jurisdiction subject to the right of removal.) The Earl of Halsbury pointed out that this question had been thrashed out before a Commission, of which the noble and learned Lord Gorell was the head, and that body in a very distinct manner negatived the suggestion made in Clause I.

'The Bar Council and the Northern Circuit had sent

him strongly-worded protests against the proposed new system. . . . He was still unconvinced that the step was advantageous. Three and sometimes five Judges were engaged, inquiring into the most transparent and ridiculous cases of appeal that anybody ever suggested in this world ; and, of course, the result was congestion of business in the Courts.

Lord Gorell said the Clause inaugurated no extraordinary change in the existing Law. It simply allowed a plaintiff in a Common Law action to go to the County Court, and if the defendant did not agree, the action was removed to the High Court without any interlocutory application. . . . There was great dissatisfaction in the country at the way in which the High Court work was done, because of the expense and the shortness of the time allowed to the Assizes. . . . There was a demand that the County Courts should have the suggested facilities, and there was no danger of their being overworked if adequate arrangements were provided elsewhere.

‘The Lord Chancellor expressed the hope that their lordships would not respond to the invitation of the noble earl by striking out the vital Clause of the Bill. The evil of litigation was that it was so expensive, and they had in the County Courts, which were situated all over the country, a tribunal which had now by Law, if the parties were agreed, power to try almost any kind of case they pleased. In Scotland the sheriff had unlimited jurisdiction ; nearly all the business was conducted locally and to the universal satisfaction of the community. Something had been said about the effect of this proposal on the Bar. He had a sincere affection for his profession, and he was quite certain that the Bar would never be better advised than to keep in constant and harmonious touch with the interests of the public (hear, hear). The Bar would therefore in his judgment never desire to hinder a reform which was generally desired by the

public. He also believed that in these special sittings set up all over England, with the County Court Judges trying important cases, the Bar would find it to be of advantage, because the measure would give facilities for the kind of litigation to which the majority of people would have recourse in the desire to obtain Justice (hear. hear).

'The Committee divided, when there voted for the Clause, 32. Against it, 37. Majority against, 5. The Clause was therefore rejected.'

*The Times* of August 2, 1909, has the following reference to legal matters in a leading article: 'One thing is clear—things cannot remain as they are; the existing system of judicature, superior and inferior, no longer suits the country. By universal admission, large changes of some sort are essential, and it is quite possible that the Bill [County Courts Bill] may be reintroduced next session into the Commons and may, in its final form, be less palatable to those who voted against Clause 1.

'The fact is that an old order is breaking up, and that a number of forces, some of them new, are struggling for mastery or, at least, recognition; the strong professional forces in favour of the maintenance of a central Bar and the disruptive tendencies to form in the chief towns local Bars—both central and local Bars united in resistance to the Solicitor-advocate, who, with the existing jurisdiction of the County Courts, sweeps off business which was once the prerogative of the barristers; the desire to keep the County Courts to their original lines combating the desire to bring Justice to the doors of the suitors.'

In the House of Lords on July 12, 1911, Lord Gorell, in supporting the County Courts Bill, said:—

'On the question of cost he had placed before him a vast amount of evidence on the respective costs of

County Courts and High Courts, and both in the matter of convenience and costs there was sufficient to explain why they found people content to go into County Court. It was interesting to point out how much England was behind in facilities for bringing cases rapidly, economically and locally. In France there were 375 tribunals of the High Court covering the whole country. In Germany there was a local High Court for every 25,000 of the population. In Holland there were twenty-three local High Courts.'

At the annual meeting of the Bar on January 19, 1910, the following motion was lost by a large majority :—

'One-third of the elected members shall go out of office at the time appointed for the close of the election in each year, and shall not be eligible for re-election until after the expiration of one year.'

The mover said that 'the proposal gave every elected member of Council a certain life of three years on the Council and insured the introduction of new blood. Some members of Council had been members for fifteen years. It was in the interest of the profession that a certain number should retire by compulsion, and should not be eligible for a year. In all institutions of this kind there was a similar rule.'

The sachems of the profession would have none of it. A large majority against such a perfectly reasonable proposal is highly significant of the attitude of the Bar to reform, no matter from what quarter the suggestion may come.

Signs are not wanting, however, that the public are becoming more and more dissatisfied with our legal system and are choosing a very effectual method of showing it.

*The Times* says: 'The Chancery bill of the community, like its drink bill, is waning; the fine old love of law for law's sake is, it may be, disappearing. Somehow

or other the fountains that once flowed so copiously are being dried up.'

In 'Die englische Gerichtsverfassung,' Dr. Gerland, of Jena, says he has reason to believe that the income of the Inns of Court are approximately as follows. —

Inner Temple	£21,000
Gray's Inn	£18,000
Middle Temple	£10,000
Lincoln's Inn	£8,360

Hansard, vol. xv. House of Commons, February 23, 1810, Lincoln's Inn Benchers. Petition of Mr. Farquharson.

Mr. Sheridan : ' Sir,—I rise to present the petition of a gentleman of the name of Farquharson, to which I request the particular attention of the House.

' I present it with great reluctance, because it contains a grave and serious charge against a respectable body of men, the Benchers of Lincoln's Inn, and alleges that they have committed an act of grievous and unwarrantable oppression. The petition states that the Benchers of the Honourable Society of Lincoln's Inn have violated the principle of the Constitution of the United Kingdom, and have usurped the powers of the Legislature by making a certain rule or bye-law to the following effect: " 1807. That no person who has written for hire in the newspapers shall be admitted to do exercises to entitle him to be called to the Bar."

' Now, Sir, I am not meaning to dispute the title of the Benchers of Lincoln's Inn to make individual objections to the admission of any person into their Society whom, upon just grounds, they may deem to be unfit to be called to the Bar; but I do contend that any general sweeping rule of this sort applied to any particular class of men, and tending, as it necessarily must do, to degrade that class, is not only oppressive and illegal, but also unconstitutional. I contend that against this bye-law there

is no other mode of redress than by an appeal to this House; the Society, whatever description it may have, or however it may be constituted, not being that kind of corporation against which any person can have a remedy by appeal to the Court of King's Bench or by *quo warranto*.'

Our lay readers may not be aware that the Inns, by an artful provision, have protected themselves against writs, and this safeguard has secured the recognition of the Judges. 'An Inn is no corporate body, but a voluntary society. There is no one in an Inn to whom a writ can be directed.'

The debate was resumed on Friday, March 23, of the same year. The Attorney-General opposed the motion, not on the merits of the case from the consideration of which he professedly abstained, but because there was a legal remedy by application to the twelve Judges. The interposition of Parliament would be premature and improper. Sir John Anstruther, a Benchler, and Mr. Stephen, a member of Lincoln's Inn, regretted that the regulation had been adopted.

The Solicitor-General maintained that the twelve Judges had a jurisdiction to redress the grievance and change the rule itself. He professed his belief that the Benchers would see cause to reverse the rule.

Mr. Croker condemned the regulation in strong terms, but as there was some hope of its being withdrawn, he hoped Mr. Sheridan would withdraw the motion. This was accordingly done.

In his work on the 'Anomalies of English Law' the author, Mr. S. B. Chester, of the Middle Temple, makes a strong case for the Barrister's right to receive clients without the intervention of a third person, namely a solicitor. The chapter concludes with the following note, which seems to have been suggested by a timely recollection of the disciplinary powers of the benchers :—

( ' Mr. Chester wishes it to be clearly understood that his suggestion of a direct approach to counsel is only put forward because he has witnessed the success of the system in other countries; otherwise, he would not venture to mention such an innovation. In this chapter, at any rate, he desires to assume the rôle of commentator rather than that of an advocate.')

A member of an Inn of Court must apologize for mentioning an innovation.

Writing in the *Daily Mail*, of May 14, 1912, Mr. H. G. Wells says, under the heading 'The Labour Unrest; The Lawyer's tone': 'Law is the basis of civilization, but the lawyer is the law's consequence, and with us at least the legal profession is the political profession. It delights in false issues and merely technical politics. Steadily with the ascent of the House of Commons, barristers have ousted other types of men from political power. The decline of the House of Lords has been the last triumph of the House of lawyers, and we are governed now to a large extent, not so much by the people for the people as by barristers for barristers. They set the tone of political life. And since they are the most specialized, the most specifically trained of all professions, since their training is absolutely antagonistic to the creative impulses of the constructive artist and the controlled experiments of the scientific man, since their business is with evidence and advantages and the skilful use of evidence and advantages, and not with understanding, they are the least statesmanlike of all educated men, and they give our public life a tone as hopelessly discordant with our great and urgent social needs as one could very well imagine. They do not want to deal at all with great and urgent social needs. They play a game, a long and interesting game, with parties as sides, a game that rewards the industrious player with prominence, place, power, and great rewards; and the

less that game involves the passionate interests of other men, the less it draws them into participation and angry interference, the better for the steady development of the politician's career. A distinguished and active fruitlessness, leaving the world at last as he found it, this is the political barrister's ideal career. To achieve that, he must maintain legal and political monopolies and prevent the invasion of political life by living interests.'

### APPENDIX C

A curious case is reported in *The Times*, of November 29, 1909. It turns on an offence recognized by Law under the expression 'Derogation of Costs.' It was an appeal from an order of the Divisional Court reversing an order of the Official Referee. He ordered the defendant to pay the plaintiff's solicitor his costs, on the ground that the plaintiff and defendant had compromised and settled the action behind the back of the plaintiff's solicitor!

The Court dismissed the appeal.

Lord Justice Vaughan Williams said that in his judgment this appeal must be dismissed and that no collusion had been proved. Taking the whole of the evidence together, he could not say that the defendant had done anything from which the inference could be drawn that he was a party to a proceeding which he knew would be likely to deprive the plaintiff's solicitor of his costs. Giving the widest meaning to the word 'collusion,' there was nothing to show that the defendant had any intention to deprive the plaintiff's solicitor of his costs. In this connection he only wished to read the passage in the case of 'The Hope' (B.P.D. 146), where Lord Justice Lindley said: 'There is no rule that the parties may not compromise an action without



the intervention of their solicitors. They must, however, do so honestly, and not intend to cheat the solicitors of their proper charges.' The evidence in this case did not satisfy him that the defendant knew that the plaintiff never would pay the solicitor's costs. In his judgment, therefore, the appeal failed. The other Judges arrived at the same conclusion.

This is probably the only country in the world where such an action could have succeeded in first instance. Observe how resisting a perfectly monstrous claim involves the winner in heavy expense. 'Taxed costs,' which follow the verdict, differ materially from real costs.

In a letter to the Law Society, written on July 14, 1910, Mr. Lloyd George, Chancellor of the Exchequer, in acknowledging a vote passed on him by an overwhelming majority of the Society, says: 'I myself am a member of the Society, and nothing could be further from my wishes than to discredit a Society to which I belong. But the attitude of the Society towards such matters as Land Transfer, the Middlesex Registry Act, 1891, and the Public Trustee Act of the last Parliament, is perfectly well known and is on record in its reports. It has been invariably an attitude of criticism and in favour of maintaining the *status quo*; and yet no one, I imagine, would contend that legal business in this country is not in need of simplification, or that simplification would fail to mean smaller costs.'

The vote referred to is in these terms—it was passed on July 8: 'That this meeting protests . . . and declares that the allegations made by him in that speech to the effect that the Society's opposition to proposals in Parliament has been uniformly based upon a selfish desire to maintain professional charges in disregard of the public interest is unfounded in fact, and is an unjust

aspersion upon the honour of the profession of which he is a member.'

At the Royal Commission on the Law of Divorce, reported in *The Times* of March 5, 1910, Mr. S. Héron Allen, senior partner of the firm of Allen and Son, Solicitors, said that 'the greatest scandal that could exist in any judicial proceedings arose out of the publication of the details of divorce cases in the newspapers.

'Unfortunately the profession had been invaded by a certain class of practitioner who seemed to think it the end and object of their existence to turn their practice in the Divorce Court, combined with the publication of sensational details, into an elaborate blackmailing machinery. He gave a number of instances in which blackmail had been extorted from men under the threat of divorce proceedings.

'It was unfortunately the fact that proceedings were filed by a certain class of practitioner in which the alleged misconduct was purely imaginary. These things were done deliberately and happened very often. They are painfully common. I am speaking from personal experience, and I have in my mind two cases which happened during the last six months. In each case the man paid in order to avoid publicity. I have had half a dozen such cases during the last two years. In the last ten years I have been consulted in about fifty divorce cases, and I have only once been in Court. In all other cases we arrived at a *modus vivendi*.'

'Do you mean that in some cases an allegation of adultery has been made against a man although there was no ground for it, and that he has paid money to avoid going into Court?'

'Yes; I could show documents to the Commission proving that what I say is absolutely true.'

In reply to further questions, the witness said 'that half a dozen of the fifty cases would come within the

blackmailing description, and in each case there had been a money payment. It was difficult to apply the Criminal Law to solicitors who undertook that type of case. He could call to mind ~~three~~ such solicitors with whom he had personal relations. He did not know of any cases of that sort that had been brought before the Law Society. It could not be done, because they could not find the clients to go into Court and tell these stories against themselves. He recalled one case in which a man paid about £1000 through a solicitor, ostensibly in settlement of his wife's debts. He thought the legislature ought to take such steps, that the process of its Courts should not be used for the purpose of levying blackmail.'

In the *Daily Mail's* City article, July 15, 1910, there is the following: 'A side issue of importance has arisen in connection with the affairs of the Law Guarantee Society. Not naturally Companies which are paying premiums to the Trust for the insurance of their debentures do not care to go on paying, and some are actually refusing to part with more money to it, either in the way of debenture insurance premiums or as Trustee fees. But the liquidators of the Law Guarantee Society point out that they must go on paying. "We are advised that these sums continue to be payable notwithstanding the liquidation of the Law Guarantee Society. And we must accordingly call upon you to make such payment. We would also desire to call your attention to the fact that non-payment of these sums is a default under the provisions of the Trust deed, which renders the security enforceable."'

It will be interesting to ascertain whether a Guarantee Society in liquidation can really enforce payments for a guarantee which the fact of insolvency renders valueless! The most confident opinions are quoted in the affirmative. In that case the acme of absurdity has assuredly been reached.

*The Times*, of August 4, 1910, has the following, under the heading 'The Latest Development of Employers' Liability':—

'No one can be very familiar with the lives of the workers in certain industries without knowing that, as soon as an accident has taken place, vultures descend upon the victim and try to snatch from his hands, or coax him into giving up to them, a goodly part of the compensation. The present system of litigation with its uncertainties and delays cannot, we hope, be permanent.'

The vultures are solicitors, or the jackals of solicitors who are perfectly well known in the profession. It is the tendency of all bad things to become worse, and the present system of litigation will undoubtedly tend to develop further abuses unless a movement in the direction of root-and-branch reform takes vigorous shape.

The expression of a pious hope will avail us little. Nor is such passivity worthy of *The Times*, to which we are indebted during recent years for much outspoken criticism of our legal shortcomings. We cherish a hope that the leading journal will not be content with severe strictures, but will use its great influence in support of a constructive policy such as is adumbrated in these pages. It is, briefly, the organization of a real Department of Justice: a specially trained judiciary, equally removed from the atmosphere of the Bar and the devious ways of politics. This course offers three main advantages, with the potentiality of innumerable reforms. Young men, on completing their studies, would make practical acquaintance with their duties as magistrates. So we should have an efficient, vigorous, and homogeneous magistracy. With the experience of years superimposed on their early training; with an entire freedom from the prepossessions and defects of advocacy, we should have a better judiciary than we have ever possessed; and the last but not least of the advantages would be a salutary and much-needed check on the multiplication of

appeals and fresh trials, of which the present enslavement of the Bench to the letter is the predisposing cause.

Mr. Kipling tried to shame us out of the football craze with something about the 'Flannelled fools at the wicket and the muddled oats at the goal.' We regret that his success has not been conspicuous. There are croakers among us who pretend that our crowds' absorption in games, at which they are mere spectators, has a resemblance of evil augury to that of the populace in Constantinople in the closing years of Byzantine Empire when the Turk was at the gates. A writer who evidently thinks that we are suffering from Byzantinism in sport has the following, under the heading 'Anglo-Saxondom's Contribution to Civilization':—

'The only serious occupation of Anglo-Saxondom and its chief contribution to civilization are games of ball. To these games all ages and both sexes devote themselves with feet and with hands; with instruments of different kinds; with balls of different sizes. Anglo-Saxon ambitions centre in a ball; the lawn-tennis ball; the real tennis; the racquet; the fives; the football, the base-ball or the hockey variety.

'The red cricket-ball is the dream of the Englishman's boyhood; the white golf-ball the consolation of his old age. Patriotic antiquarians have revived the bowl and the skittle ball. The croquet ball is a gallant acknowledgment of the existence of the weaker sex.

'Asia, the ancient, has yielded Anglo-Saxondom the polo ball; America, the new, the lacrosse and the base-ball. But while outdoor games are flourishing, the absence of any great national indoor game is a source of grave anxiety. Millions are still condemned to periods of intolerable *ennui*. But there is no need to be despondent. The genius of Anglo-Saxondom will yet be equal to the occasion and in due time a game of ball will

be introduced which can be played by night as well as by day. Meanwhile billiards, bagatelle, and ping-pong help to save the situation.

‘ But the supreme expression of the genius of the race is cricket. It is played with the zest of a game and the solemnity of a religious function. This happy combination of sport, ritual, and religion has no parallel elsewhere. A game frequently lasts three whole days if uninterrupted by rain. The younger British nations, the Australians for example, untrammelled by English traditions but more pious than their progenitors, resolutely decline to have cricket celebrations subject to any time-limit whatsoever. With a constant improvement in pitches and increasing brilliancy in batting and bowling, there is every prospect that cricket will soon occupy a considerable portion of human life. What opium is to the Chinaman, cricket is to the Englishman. The question of peace or war may be hanging in the balance ; all interest in such trifles disappears before the telegraphed score in the test match. And such occult phrases as “ bringing back the ashes ” are found as comforting as the blessed word “ Mesopotamia ” to old women of an earlier age.

‘ It is manifestly unjust to dispose of these engrossing pursuits as mere relaxation. For the middle and upper classes they present the only effective means of education. Proficiency in them is the hall-mark of all the virtues. Nor is there a better instance of the Anglo-Saxon love of compromise than the fact that great and wealthy foundations, established and endowed for academic purposes, have been successfully adapted to national needs and brought into harmony with the national taste.

‘ To propel a ball with force and accuracy gains the admiration of youth, the smile of beauty and the approbation of age. It is the promise of professional eminence ; the guarantee of success in business ; the sure indication

of military genius. It is at once an ethical standard and a social passport. Its greatest exponents are already national heroes, and in the approaching millennium it is for them that the laurel will flourish—not for poet, musician, scientist, or soldier.’

There is a fixed scale of notarial fees in France, Holland, and Belgium. As regards the notarial responsibility, Labori (page 592) says: ‘The notary is also responsible for defective work due to omission of required formalities . . . he is responsible for all defects of form in the documents he draws up. . . .’

According to Belèze, ‘The security demanded of notaries in the provinces varies from 4000 to 25,000 francs. In Paris it is exceptionally high—50,000 francs. The value of a notary’s business runs to 500,000 francs at the least. These ministerial officers must not only be men of the strictest probity and act with most absolute discretion, but they must also abstain from any participation, direct or indirect, in speculative enterprises or financial operations. If a client has suffered loss through the act of a notary—if, for example, he has made a blunder in a document, which makes it null and void, an action for damages can be taken against him.’

Our Courts admit the solicitor’s liability for blunders in will-making; but they hold that the action must be brought by the departed, not by a beneficiary; with the latter there is no contract. The former cannot revisit the glimpses of the moon. This is one of the most insolent of our Byzantinisms.

Our legal Manchus will be well advised not to base their claim to the management of the British Empire on the skill with which they conduct their own business.

The Law Guarantee, Trust and Accident Society, Ltd., was registered in 1888 as the Law Guarantee and Trust

Society, Ltd. In July 1907 the name was changed as above. The authorized capital was £2,500,000.

For 1899 and 1900, interest at the rate of 8 per cent. per annum was paid on the ordinary shares. For the seven years to 1907, 10 per cent. was paid. For 1908, 2 per cent. was paid as an interim dividend. In the spring of 1911 the Society went into liquidation.

In an action brought by one of the officials of the Society against a weekly paper, and reported in the *Financial Times* of Thursday, April 27, 1911, Sir Edward Carson said :—

‘The Directors were nearly all solicitors of eminence and had great experience in the kind of business which the Society carried on.’

Referring to this liquidation, the City Editor of the *Observer*, writing the last Sunday of the year 1911, says : ‘The Lord Chief Justice—who was misled and signed a letter urging voluntary liquidation which caused the shareholders to say voluntary liquidation it should be, and thus they became hopelessly sidetracked now that they want an inquiry—says, in his private capacity, clearly that he was misled, has altered his mind, and thinks public investigation necessary. . . . But do not let there be any mistake about it. Full investigation there must be. If Mr. Asquith and other leaders of the legal profession do not realize the eternal disgrace of avoiding an inquiry, the while unpleasant things are being said of the professions concerned, it is time they acquainted themselves with the full measure of the scandal.’

On January 2, 1912, the *Pall Mall Gazette*, in an article on this subject, intersperses some heavily-leaded passages such as the following—it is a finding of the Committee of Investigation :—

‘As regards the accounts and balance sheets for the years 1906–7 and 8, it seems reasonably clear that the true position of the Society was not disclosed to the shareholders in those accounts.’ The writer insists on the



urgent necessity for 'a full inquiry into 'this grievous scandal, and removing the disgraceful apathy seen in high places.'

The following letter appeared in the Press on January 5, 1912, under the heading 'Doctors and Solicitors'—

'I wonder whether your lay readers have thought of comparing the strange difference of the amounts which medical men and solicitors ought, in the opinion of the Cabinet, to receive for their professional services. According to "Observer," in his letter of this day, a doctor is, under the Insurance Act, permitted to receive £300 per annum for 16,000 visits to his patients. A solicitor is, I believe, entitled to charge 6s. 8d. for each interview with a client, which I take to mean is £5,333 per annum for 16,000 interviews in his office; whereas a medical man will have to work for seven days a week at any hour, day or night, and in all weathers, for the pittance of £300 per annum.'

The ludicrous side of the contrast between the treatment meted out to the medical profession and that reserved for its own myrmidons by Legalism is well brought out in an article that appeared in the *Daily Mail*, of June 11, 1911, under the heading 'Sauce for the Gander.' The writer conjures up a Utopia where the medical fraternity—not the legal—hold sway.

'This Government of medicos is taking in hand the improvement of the general social condition of the people. The particular phase of this improvement, which is to the fore, is the arranging for satisfactory legal assistance to the pauper, the working class, and the lower middle class.'

'It is preposterous,' said a young surgeon to me—I afterwards discovered he was one of the Government whips—'that a working man should be unable to obtain legal assistance in certain necessary directions owing to the immense expense involved. Such a man is shut out of the Divorce Court. How far will his savings out of

thirty shillings a week enable him to fee the various lawyers, without whom entry to the higher Courts is denied him? We shall end all this! Justice is the inalienable right of all Englishmen; and the sword of Justice itself is about to hew down the barrier that has so long stood betwixt Justice for the poor and Justice for the rich.' . . . 'Another great feature of the scheme for bringing the blessings of Law and Justice into the homes of the poor is an arrangement under which, by a capitation payment of a certain sum per annum on behalf of each citizen or individual, the latter shall have the right to the advice of a solicitor for one year. The exact amount of the payment we have not yet decided upon; but I take it that 5s. per head per annum for advice given at the solicitor's office or at the home of the client will be about the figure. We shall not require the solicitor to supply the inquirer with paper, sealing-wax, red tape, etc., for this sum; but for the purpose of providing these articles we shall add a further shilling to the five making six shillings, which I think you will agree is quite satisfactory.'

In his recently published work on 'Anomalies of English Law,' Mr. Chester, of the Middle Temple, writes (p. 188): 'The law is not as a rule a recreation for anyone, save a few persons whose minds have been turned by years of litigation. Consequently, the uninitiated client trusts his solicitor implicitly. He is like wet clay in the hands of the potter. He does whatever is recommended. It is true that the solicitor has the knowledge that he may be answerable in a Court of law for want of skill in looking after his client's interests, but a client does not always know this. Indeed, the most rudimentary knowledge is absent in the person who goes to a solicitor for advice. And the solicitor's own knowledge is frequently little above that of a mature office boy, though he generally manages to apply it to his own personal profit at any rate! One does not tar all solicitors with the same brush; there are many worthy exceptions; still, there is something

in the profession of a solicitor which seems to produce certain generic failings. The bad name of the profession in the eyes of the public is not altogether unfounded; it is something more than a cheap superstition or tradition. It gathers force when one comes into contact with some firms which are licensed to practise the law. The size of the offices and the number of persons employed in them are not criteria of honesty: one knows of cases where seemingly prosperous firms in the best and most central districts are no more trustworthy than the solitary, tottering scamp who struggles in a meagre garret. On the other hand, it is a gamble to go to any solicitor unless one has definite evidence in advance that he is reputed to be just and honest in his methods and has practised his business for some years. There is no scoundrel like an old scoundrel, of course; but a well-established firm is *prima facie* better equipped with the requirements of the client than some new firm which has not yet felt its feet. . . .

In a recent issue *The Times* devotes a leading article to a very mild defence of the Bar Council and the Law Society against Lord Loreburn's criticisms. As regards the former, the burden of the defence is to bring into prominence the names of the great reformers such as Mackintosh, Romilly, and Brougham by way of showing that not all reforming movements originated outside the legal entrenchments. It is admitted that a minority of our judiciary have earned undying fame and saved our legal history from unqualified condemnation. But the question for any reader who wishes to judge of the merits of a system is, which type of Judge is it calculated to produce—the mere legalist or the lawyer properly so-called. On investigation it will be found that Judges like Mackintosh and Romilly were extremely rare, whereas men like Eldon and Parke were the prevailing type. A greater reformer than Mackintosh or Romilly was roundly denounced for waving aside technicalities. We refer to Lord Mansfield. It is a poor system that is only redeemed from utter

bankruptcy by the men whom it persistently denounced during the greater part of their lives, but who are now revered because they acted in direct contradiction to its most honoured traditions. In one sentence the leading journal gives its case away. It says: 'Laymen are generally incapable of dealing successfully with a subject steeped in technicalities.' Why are all legal subjects steeped in technicalities? For no other reason than to make the advice and assistance of a pundit necessary at every turn, and to warn off the laymen. The sentence cited is consequently no defence; it is an admission of the truth of the accusation. Our neighbours have made the most strenuous endeavours to make law intelligible to the laity, and their success is a magnificent testimonial, whose value is enhanced by the gratitude of their countrymen without distinction of class.

*The Times* opines that the suitor of to-day is more exacting than of old, 'perhaps more unreasonable.' Is it surprising? How long can our legalists hope to maintain the Chinese wall of ignorance as to the benefits of codification?

In *The Times* of December 9, 1911, under the heading 'Suspect Solicitors,' there is a reference to a correspondence between Judge Rentoul and Mr. Humfrys, of the Law Society, regarding expressions used by the Judge on the malpractices of certain solicitors.

Mr. Humfrys wrote to Judge Rentoul on October 20, 1911: 'Whenever any malpractices by solicitors are brought under the notice of this Society, they are not only investigated but effectively dealt with, so far as our powers extend.'

In a reply on October 29, Judge Rentoul said: 'There are a number of solicitors, known by name and reputation to you and to me, who have a reputation such as unfits them for being on the same Law List with men of honour and integrity. I think you have the duty of taking the

initiative, and if you have not the power, you should get it.'

'So sure as there is an accident with a vehicle of one of the substantial carrying companies, or, indeed, of any good firm, an emissary of one of some half-dozen soliciting agencies swoops down like a vulture on carrion and murmurs 'Compensation.' These persons walk the accident wards with more assiduity than the medical students themselves. In one case a hospital porter was known to present the card of one of these gentry to a crippled patient. Manifestly the system is to foment litigation with a view to getting costs out of the other side. . . . If they succeed once in five times they are well paid.'—*A Chance Medley.*

In 'The Village Labourer,' by J. L. and Barbara Hammond, p. 215, we read: 'The lawyers who interested themselves in the poor were enlisted, not in the defence of the rights of the commoners, but in the defence of the purses of the parishes. For them the all-important question was, not what rights the peasant had against his lord, but on which parish he had a claim for maintenance, . . .'  
P. 216: 'Thus the principal occupation of those lawyers, whose business brought them into the world of the poor, was of a nature to draw their sympathies and interests to the side of the possessing classes; and whereas peasants' ideas were acclimatized outside their own class in France as a consequence of the character of rural litigation and rural lawyers, the English villager came before the lawyer, not as a client but as a danger; not as a person whose rights and interests had to be explored and studied, but as a person whose claims on the parish had to be parried or avoided. It is not surprising, therefore, to find that both Fielding and Smollett lay great stress on the reputation of lawyers for harshness and extortion in their treatment of the poor, regarding them, like Carlyle, as "attorneys and law beagles who hunt ravenous on the earth." Readers of the adventures of Sir Launcelot

Greaves will remember Tom Clarke, "whose goodness of heart even the exercise of his profession had not been able to corrupt. . . ." Fielding speaks, in a footnote to "Tom Jones," of the oppression of the poor by attorneys as a scandal to the law, the nation, Christianity, and even human nature itself.'

## APPENDIX D

At the Royal Commission on Divorce as reported in the *Observer* of February 27, 1910, Mr. Justice Bargrave Deane, in answer to Lord Guthrie, said: 'He thought greater justice was done by Judges than by juries. When he was at the Bar and was asked whether they should have a case tried by jury or not, he always considered the nature of the case. If he had a thoroughly good case, he would try by a Judge; if it was a very doubtful case he would advise that the trial should be by jury' (laughter).

Before the same Commission Sir John Bigham, in answer to Lord Guthrie who asked 'What is your view of the English system of taking a considerable number of cases with juries, and the Scotch system of taking them before a Judge?' The answer was: 'I infinitely prefer the Scotch system. I think more injustice is done by juries than people know.'

'Your view, then, is that these are the typical cases which should not come before juries?'

'Yes. The feelings of juries are influenced by all sorts of considerations which, in the opinion of a lawyer, ought not to influence them at all.' (*The Times*, March 1910.)

On July 7, 1910, an interview with Mr. George Elliot, K.C., appeared in the public Press under the heading

‘Corrupt Jurors—a Growing Evil’: ‘Cases of jurymen both in civil and criminal cases having been tampered with, are occupying the attention of legal circles, where it is felt to be an insidious evil which, if not stopped, may shake public confidence in trial by jury. There is no question of the integrity of the officials who deal with juries; but in spite of their precautions jurymen are often “got at.” I know as a fact that men sometimes personate other people on juries. At one time men used to hang about outside Courts to offer to serve in place of jurymen who were summoned—of course without the knowledge of the officials. I have had cases myself at the Old Bailey in which I know jurymen have been corrupted by the defence. I am quite sure that constant attempts are made to corrupt juries. Some friend of the prisoner who would perhaps be in a difficult position himself, if the accused person were found guilty, is usually willing to try every possible means to get his friend off. There was a case in which I was engaged. It lasted several days. The foreman of the jury used to travel to his home every evening by train. One day he was seated opposite a genial, well dressed man who was reading a report of the case. The man remarked casually that it was interesting. Curiously enough he was in possession of some information regarding the prisoner. The foreman drank it all in. The result was an acquittal.

‘On another occasion that I know of the jury, who were at luncheon, were drawn into conversation by an affable stranger, who gave them much information about the man they were trying. The jury disagreed, and as in such cases the tendency is for a second jury to favour the prisoner, he got off. He was undoubtedly guilty.

‘Another instance was that of a trial lasting many days. The jury disagreed—eleven to one. A second trial followed. It is certain that during the first trial witnesses for the defence got into communication with one of the jurymen, who disagreed with his colleagues

in circumstances that could only admit of one possible interpretation. It is extremely difficult to bring proof that a jurymen has been tampered with, and consequently very few cases have been made public.'

Asked what remedy he would propose, Mr. Elliot favoured a return to the old system by which the jury was completely isolated until the conclusion of a trial. 'There is,' he said, 'magnificent accommodation at the Old Bailey. It would be quite possible to provide juries with smoking-rooms, billiard-rooms, dining-rooms and, in cases where it was necessary, with bedrooms. Then, in important cases, jurors would not leave the building and would be saved from the attentions of interested strangers.'

Mr. William Hayes, the Under-Sheriff of the City of London, agreed with Mr. Elliot that a 'return to the old system would probably prevent many evils.'

Even with restaurant and billiard-room, would the jurymen be safe from the blandishments of the waitress and the wiles of the billiard-marker? The 'old system' is dear to the lawyer, and its extension would be dearer still to the ratepayer. The new system is partial abolition of the jury system, even in criminal cases. Our Continental neighbours have abolished it long since in civil cases.

In *The Times* of December 21, 1912, we read that 'In the Legislative Council of Southern Rhodesia to-day (December 20) Sir Charles Coghlan, one of the elected members, moved that the present system of jury trial was unsuited to cases where Europeans were charged with serious crimes of violence against natives, or natives with crimes against Europeans; and that to ensure the proper administration of Justice it was necessary that a more satisfactory system should be substituted and that the Administration be requested to introduce legislation next Session.' That is the new system. It is becoming more and more evident that the jury system must go.



Attempts have been made to show that the jury system is essentially English in origin ; that it is due to King Alfred ; that other races have followed us in adopting it. This claim is without historical foundation. It is more correct to say that all races have had something analogous to trial by jury among their primitive institutions. But if we cannot claim originality, or novelty, ours is the credit, such as it is, of being the first to give the jury system the enormous extension and development which it has almost universally obtained.

A highly important step in this direction was taken after the Norman Conquest. The Norman rulers, and more especially the Norman Judges, were obliged to rely on what were called 'recognitors,' meaning men who had local knowledge in dealing with the hundred-and-one questions which arose out of the inheritance, purchase, sale, taxation, tenure, and boundaries of land. These 'recognitors' had to decide chiefly as to matters of usage, custom, and tradition. Obviously this conception involves an inversion of the functions of Judge and jury as at present understood. Indeed, it is evident that the 'recognitor' was not a juror at all in the modern sense. He was an expert witness retained by the Government on account of his local knowledge. Some of the wildest extravagances of special pleading have been directed to proclaim the jury system as the greatest achievement of English jurisprudence, inasmuch as it utilized local knowledge in the administration of Justice. The fact is that we have nothing in direct logical—as distinguished from official—succession from the old 'recognitors,' except the jury of matrons ! The male juror in his present capacity is a comparatively modern contrivance, and his local knowledge is an absolutely negligible quantity.

In course of time the function of 'recognitor' merged imperceptibly into that of the juror, as we know him, in proportion to the enactment of a uniform system of

land and other laws which rendered the Judges less and less dependent on local usages and their exponents. And so it came about by a process of evolution, that the province of the jury was strictly limited to questions of fact. But, it was long before the present distinction was definitely drawn between jurors and witnesses. We find the Recorder of London - this legal luminary has often been a 'harbittary gent.' - in the time of Edward III. declaring that 'if the witnesses do not agree with the jurors, the verdict of the twelve shall be taken and the evidence of the witnesses rejected.'

During the same reign it was decided that the verdict must be the unanimous opinion of the whole jury. Diversity of opinion was taken to arise from perversity and the law sanctioned the application of the harshest methods to produce unanimity. The jurors were not allowed to eat or drink but by leave of the Justices, and they might be carried round the circuit in carts until they agreed. 'These rough enforcements of an unanimous verdict have been softened later,' says our commentator, 'but the rule itself remains.' It is a relic of barbarism.

The jury system served a most beneficent purpose when the Bench was venal or took its orders from a corrupt Court; that is supposing that the jurors themselves were not open to be bought and sold. Many a poor prisoner had occasion to thank Heaven for the institution of trial by jury for having escaped without the loss of his liberty or his life. During the Stuart period, and occasionally in earlier times, the jury system found abundant justification, and it has therefore indisputable claims to our respect, however outworn and even harmful it may prove in the altered circumstances of to-day.

The first reflection which forces itself upon us in considering the jury system is the extraordinary limitations to which it is subject, even within the British

Empire. During periods of great political tension in India there is no possibility of getting a verdict in accord with the plainest, most explicit evidence. No trial by jury is necessarily suspended. An institution which breaks down at the first breath of popular excitement resembles a ship which is only safe when the sea is as smooth as a millpond. Coming home, we find that enormous expense is incurred in Ireland—one of the poorest countries in the world—owing to the repeated trials of a case in which one jury after another brings in verdicts in ostentatious opposition to the evidence, or fails to agree.

A still more serious feature than the expense is the disastrous effect on the public of the glaring failures of Justice, which our blind adherence to the jury system involves in reducing the administration of the law to a farce.

Nothing is more futile than the attempt to invest with a spurious immortality an institution which has long outstayed its welcome. It should not be permitted to become an obstruction. It should receive decent burial. Its past glories are enshrined in history.

It is worth while considering the advantages that will accrue to the administration of Justice when a Bench of Judges shall have replaced the jury system.

Let any unprejudiced person visit one of our Courts of Law during the trial of an interesting jury case. He will be forced to the conclusion that the gladiators of the Bar have a remarkably strong resemblance to the performers in the amphitheatre of ancient Rome. There is the same readiness to do battle in any cause; the same refreshing freedom from scruple; the same imperative necessity to make skill in fence the first consideration. Nineteenths of the claptrap, the histrionic effects, the hysterical appeals to popular prejudice which are calculated to thwart the course of Justice, would disappear with the abandonment of the jury system. An immensity of

time would be saved in litigation and the cost would be reduced enormously.

Let our unprejudiced observer next consult the reminiscences of eminent advocates and he will not fail to be impressed by the importance to be attached to verdict-snatching, even against the weight of evidence and the direction of the Judge. These are the advocate's triumphs—personal, anti-social triumphs—to the discomfiture of Justice. Our legal annals are replete with such cases. They are related gleefully with a sublime unconsciousness of the discredit which they bring upon the individual and the system. Truth to tell we have paid a huge price in failures of justice—and the national demoralisation inseparable from them—for the precarious protection afforded during certain decadent periods by the existence of the jury system.

We read in the public Press on July 13, 1910, that 'for the third time the jury disagreed in the trial of William Moore, who was charged at the Omagh Assizes yesterday with the murder of William and Mary Holt at High Cross, in July last. Over fifty witnesses were heard on behalf of the Crown, and the trial lasted two days and a half. The prisoner was once more put back in the cells. The victims of the murder were two old-age pensioners who lived in a thatched cottage at High Cross, and Mr. Justice Gibbons described it as the worst murder case he had ever tried.'

This is from the *Evening News* of May 11, 1911: 'At the London Sessions to-day, a man was indicted for breaking into and entering a house, with intent to steal. The jury returned a verdict of "Guilty of entering, not breaking and entering."

The Judge: 'I am very sorry, I have to direct you to find a verdict of "Not guilty" on your finding.'

To the prisoner : ' You are very fortunate. Now go away.'

Legalism was the organ and safeguard of his freedom.'

In a case where a medical man was sentenced to five years' penal servitude at Hertford Assizes, in February 1911, it appears that there were certain peculiar circumstances connected with the trial. The following statement is extracted from *Lloyd's Weekly News* of January 7, 1912. It is a sworn statement by one of the jurors, a farmer of Bishop Stortford. It casts a flood of light on the manner in which certain juries fulfil their duties :—

' When the jury retired they did not elect a foreman nor properly consider the evidence in arriving at the verdict. There were only about three of us who talked about it in the jury-room. We were for conviction.

' There were four or five who did not care one way or the other ; some of them said so. All they wanted was to catch their trains ; they only spoke of the loss of money and time in serving on juries, and the great distance they were from home on a Saturday night. The four or five who did not care agreed at once, and without discussion, with the three of us who were for conviction, to save time ; the others who were for acquittal gave in, because they were afraid of losing the last train.

' The jury did not understand the case, it was too technical.'

The following paragraph appeared in the *Daily Mail*, of February 8, 1912, under the heading, ' Jury on the Telephone.' The paragraph begins : ' Mr. Justice Ridley, explaining to the jury in the East End murder trial at the Old Bailey yesterday that they would have to be kept in the Manchester Hotel all night, said he believed that the telephone, which was " a new

invention," was permitted, but the jurors must not communicate with the outside public.'

It is difficult for anyone not well on the way to complete the century to think of the telephone as a new thing, although it is quite up to date compared with trial by jury. To say in the same breath that jurors are free to use the telephone, but not to communicate with the outside public, is a fresh departure in the refinements of Legalism. The rule which directs that the jury shall be locked up is based on the theory that, for the purposes of the administration of Justice, the duty of the jury is so important that his own household is, for the occasion, considered as part and parcel of the outside public. If the telephone is permitted, the whole position is changed and the old theory is abandoned. The sooner the jury system follows the old theory the better.

The following extracts are from 'Pie-Powder,' by 'A Circuit Tramp' (John Murray, 1911): 'It is, moreover, an undoubted fact that juries give larger damages in London than they do in the Provinces, and I remember a client who was deprived of costs by Sir Henry Hawkins on the ground that the cause ought to have been tried in Dorsetshire, but who consoled himself with the reflection that he had recovered five hundred pounds, where a country jury would have given him fifty' (p. 6).

'I cannot help thinking that with regard to civil litigation, trial by jury is becoming something of a fetish. . . . It has become almost a commonplace for counsel, in cases where he feels his client is wrong, to advise trial before a jury. It is true that he often gives the same advice when his case is a good one; but usually with the object of getting inflated damages—that is to say, more than his client deserves. . . . It is this practice which renders it possible for a County Court Judge to say: "That if it was possible for a jury to do wrong, it would do it; and

that if people had a rotten action they asked for a jury, knowing that they would get what a Judge would not give them (pp. 108-109).

'I once heard a Judge conclude his summing up to the jury as follows. 'I dare say you will have gathered from what I have said that I think you ought to find for the defendant. So I do. And I further think that you will be very wrong if you don't.' . . . It is none the less certain that many unrighteous and mistaken verdicts are permitted to stand; and the sense of injustice never presses more heavily on the disappointed litigant than when he has appealed against such a verdict in vain' (pp. 110-111)

'Some years ago I remember witnessing the prosecution of a scoundrel popularly known as Dr. Jack, who was tried at Bodmin, for murder, resulting from an illegal operation. . . . The Judge did not know that the prisoner had inherited his nefarious business from his father, that he was regarded in the neighbourhood as a public benefactor rather than a criminal, and that arrangements had already been made to meet him at the railway station, in the event of an acquittal, with a carriage and a brass band. The jury listened to the summing up with resolute indifference, with the result that the carriage proved not to have been ordered in vain and the band played' (pp. 117-118).

In an obituary notice of the late Justice Grantliam, a weekly paper has the following: "There was the historic storm raised by his statement that 20 per cent. of people accused of crime are acquitted when they ought not to be, by counsel endeavouring to attract the attention of the jury from the strong points made against them at the trial, and thereby raising what we speak of in a technical sense as false issues.'

In 'Études et Discours,' by M. Maurice Sabatier (Paris, 1911), the author tells us that, in preparing the Criminal

Code, Napoleon hesitated long when considering whether the jury system should be retained (p. 83). 'In sanctioning the revolutionary tradition, Napoleon was not the man to leave public order without defence in view of the possible failure of the jury system. He made it a condition that the system should be reorganized—and on this point there was general agreement; moreover, that there should be special tribunals for trying crimes in regard to which juries have always shown weakness. For instance, the jury is very lenient to attacks on the police which frequently occur in incidents connected with conscription; and on the other hand, crimes committed by beggars, vagabonds, lawless men and bands of malefactors require a firmer hand and prompter treatment than can be given by juries. . . . In short, the jury system was retained as an experiment: if the experiment was successful so much the better' . . . (p. 90). 'At Aix on the 14th Fructidor, year IX, after a trial lasting seventeen days, several accused persons were acquitted by the jury, despite the fact that they were part of a band of malefactors, some of whom were condemned to death or to imprisonment in irons. Notwithstanding the acquittal, they were all put in irons and conveyed back to prison, tied to the same chain, by order of the prefect. . . . These measures of public safety did not greatly shock Napoleon.'

Napoleon's distrust of the jury system has been amply justified by its recent history. And now it is threatened with partial abolition, in certain criminal cases, in our Sister-States, while we adhere to it in civil cases and thereby introduce expense, delay, and uncertainties without end.

In the Jury Return for 1912, under the heading 'Persons exempt from Jury Service,' there are no fewer than thirty-nine categories, beginning with peers and ending with criminals. There can be no doubt that the working of the jury system has been gravely prejudiced by



the multiplication of categories of exemption. We shall probably dispense with juries in civil causes before many years, if the opposition of the Bar can be overcome. But as regards criminal cases, the question arises whether many of those exemptions should not be overhauled with a view to their reduction. Writing on this subject, Dr. Gerland mentions the increasing exemptions as a disquieting feature

In *The Times* of April 27, 1912, under the heading 'Jury System to be Abolished,' we read: 'A draft ordinance has been issued here [Salisbury, Rhodesia] abolishing trial by jury in the case of serious crimes committed by natives against Europeans, and *vice versa*. The ordinance provides for the trial in such cases before a Judge of the High Court, assisted by Assessors, the Judge's decision being the judgment of the Court.'

When the jury system was most needed as a defence against the capricious tyranny of a corrupt Government, it seems to have been a broken reed. In *The Times* of May 17, 1912, there is a report of a lecture by Sir John Macdonell on 'The Trial of Sir Walter Raleigh,' in which the following passage occurs: 'Whether judicial corruption existed on a large scale in those times is obscure. But if the cases of Bacon and Lord Macclesfield had passed unnoticed, the practice of receiving "épices" might have become as common in those days in England as in France. Remember, too, the position of jurymen, liable to be punished by writ of attain or otherwise for finding a wrong verdict—that is, a verdict disagreeable to the Crown—and the absence of counsel in the majority of cases in which the Crown was most deeply concerned. If a Judge had in those times frankly charged a jury in a political case according to the facts of the situation, it would have been in some such terms as these: "If you acquit

the prisoner I shall be dismissed, and you will go to prison or be fined. Consider your verdict."

'A judge once summed up "dead" for the plaintiff, and plainly told the jury they could find only for him. They disagreed—eleven to one. The judge addressed that one, coaxed him, and tried to induce him to give in, but he stood out, and they were discharged without a verdict. It then turned out that the obstinate one was the only man for the plaintiff! A true story.' *'A Chance Medley.'*

'Perhaps the oddest verdict is that mentioned somewhere by Sir Francis Palgrave, who records that a Merionethshire jury once said: "My lord, we do not know who is plaintiff or who is defendant, but we find for whoever is Mr. Jones' man." Mr. Jones being a popular M.P. and counsel.'—*'A Chance Medley.'*

The following extracts are from 'The Dark Side of Trial by Jury,' by Joseph Brown, K.C.: 'The time has at length arrived when trial by jury must itself be tried. I arraign it at the bar of public opinion. I accuse it of incapacity, of ignorance, of partiality, of cumberdom, of barbarism. . . . At the summons of the law our jury-men quit their shops for the Courts of Justice; they march straight from the weighing of candles to the weighing of testimony; from the measuring of tape to the measuring out of fate; from dealing in bacon and cheese to dealing with the lives, properties, and liberties of men. Verily we are a wise people whose Commonalty possess, by intuition, the faculty of hearing sophistry and eloquence without being deluded. . . . The English people really believe that judicial wisdom springs forth nature from every tradesman's head. This is a fit article of faith for a nation of shopkeepers! . . . The "glorious uncertainty of the law" has been the boast of many a lucky rogue in slipping through the jailor's fingers; but

few have been aware how little of it was due to the law itself and how much to the glorious ignorance and uncertainty of juries. . . . Every one of the judicial murders and confiscations perpetrated under Charles II was committed by means of a jury. . . . Common juries seem unable to distinguish between the importunities of compassion and the demands of Justice. . . . "Gentlemen," said Lord Kenyon, "it is no use denying that my client fired at the bird and it fell, but what proof is there that it did not die of fright?" The jury were convinced by this ingenious argument and found a verdict for the poacher. . . . The unanimity now exacted from juries has not the sanction of antiquity. In the time of Ethelred, the law was that in a jury of twelve the verdict of eight should prevail. . . . Not long since when the usual question was put, "For whom do you find?" the reply was "We are magnanimous for the plaintiff." . . . The last evil I shall mention, and the greatest, is the number of erroneous verdicts that are come to, and the new trials that are necessary to correct them. . . . There is not a Session or Assize but we see notorious criminals escape in spite of convincing evidence and, to aggravate the evil, the law never allows a man to be tried again on the same charge. It is thus that the whole herd of villains who live by plunder come to look on the law as a rotten old net, full of holes, through which any slippery fish may escape.'

There is a refreshing frankness of expression in this barrister of the Middle Temple. Finding a law reformer at that address is a pleasure akin to that of the sceptics who found something good coming out of Nazareth. It is manifest that Mr. Brown, K.C., would dispense with juries in all causes, criminal as well as civil. He was ahead of his time. His pamphlet appeared in the year 1859.

## APPENDIX E

In a leading article on 'The Conflict of Courts' in *The Times* of July 20, 1910, we read: 'Our Courts continue to wrestle more or less successfully with the meaning of the Workmen's Compensation Act, and to extract from apparently simple words somewhat surprising results. The typical course of proceedings is as follows: A finding by the County Court Judge as to a certain mixed question of law and fact; prompt reversal by the Court of Appeal, or, at all events, disagreement between its members, followed by reversal in the House of Lords or disagreement among the Law Lords.'

The latest decision of consequence is a case in point. A stoker aboard a vessel lying in port goes on shore one evening with some of his mates to buy soap and clothing, of which he was in need, but whether with or without leave is uncertain. He had been drinking but was not drunk; and in returning to his ship by a ladder laid from it to the quay--'an unsafe contrivance and particularly dangerous at night to a man who had been drinking'--the stoker fell into the water and was drowned. Was this an accident 'arising out of and in the course of his employment'? The County Court Judge said, 'Yes.' Two of the Judges of the Court of Appeal said, 'No.' Three of the Law Lords said, 'Yes,' and two, 'No.' That is, five Judges were in favour of the appeal and four against it. It is by no means clear that the weight of evidence is in favour of the bare majority. There is force in Lord Macnaghten's contention that the 'deceased went on shore for his own purposes and about his own business, and not that of the ship. . . . It cannot be denied that there is a subtly operating temptation to slide into a vein of uncritical generosity and to strain, sometimes to breaking point, facts and law to the benefit of the

claimant. . . It is not clear where the Courts can or will henceforth consistently stop.'

In the same article the reader is reminded that : ' A majority of the Law Lords held about two years ago that a workman who had died from heat-stroke came within the Act, though death really arose from the man being physically unfit for the work. It is not easy to set limits to the operation of the statute.'

It is not difficult to foresee that this injustice to the employer will react against the worker who has the appearance of being the least bit under par. He will find it increasingly difficult to find employment. The subtly operating temptation to extract surprising results from simple words is the extraordinary warp of the legal as distinguished from the judicial mind. It is the blight of the Bar. It is Legalism, the bane of the Anglo-Saxon world.

Under the heading ' Moneylenders and the Law ' the leading journal of July 27, 1910, has the following : ' The borrowers failed to pay one of the instalments and the moneylenders seized the goods. Mr. Justice Bray gave judgment for the moneylenders. This was reversed by the Court of Appeal ; and now the House of Lords have reversed that appeal and the moneylenders have triumphed. . . . It is now the fashion to pass Acts of Parliament in the loosest possible manner and to leave the administration and interpretation to some department which frames all the regulations which give the Act vitality. That our Judges cannot help. But they can insist that those to whom the interpretation and working of the laws are thus carelessly left shall learn the business put upon them, and shall not assume arbitrary powers or read the law loosely or harshly as they see fit. This protection from bureaucratic caprice was never more necessary than it is to-day.'

Our legal history proves that the state of things described is our normal condition. Consequently volumes

might be filled—as a matter of fact, they are filled—with instances. We must content ourselves with a recent allusion to the subject. It is in the leading journal of December 23, 1911, in a leading article headed 'The Chief Recent Decisions.' The article begins :—

'With the close of the Michaelmas sittings comes a great outpouring of decisions, some of them long dammed up, from all the superior Courts. Our Law Reports this week have borne testimony to their number and variety, and to the many phases of human affairs to which they relate. A reflection which cannot fail to occur to all conversant with the vicissitudes of decisions is that in all probability we shall hear of some of them in the higher Courts, and that the decisions binding for the time may not be those which will ultimately prevail. Statisticians have attempted to state in figures the precise chances of a decision being upheld upon appeal. They vary from county to county, from Judge to Judge. But it is pretty certain, to judge from past experience, that a considerable proportion will be modified or reversed.

'Of the very many decisions which we have reported lately, none probably surpasses in importance the decision of the House of Lords in *Butler v. Fife Coal Company* : a decision which must have a bearing upon the precautions to be taken in almost every mine to prevent loss of life. The litigation has lasted long. The Sheriff-Substitute gave his decision adverse to the Company as far back as July 1907. It was reversed by the Court of Session in November 1908. It came before the House of Lords in 1910, but was sent back to the Court of Session in order that certain questions should be answered. Not until this week was the final decision, reversing that of the Court of Session. It would be too much to say that the question involved was whether the precautions taken by the Legislature for the safety of miners in the Coal Mines Regulation Act, 1887, and the rules made under it, are to be futile and worthless. Undoubtedly,

however, if the view taken by the Court of Session were to prevail, the position of every miner would be distinctly more precarious than it is now under the decision of the House of Lords. Two men lost their lives by inhaling carbon-monoxide gas in the defendant company's mine, into which the owners knew noxious and dangerous gases might penetrate. The Court below found as a fact that those in superintendence were guilty of negligence in disregarding the signs of the prevalence of dangerous gases and in not withdrawing the men. But they also found—and this was the cause of perplexity—that the superintendents “were possessed of the qualifications and experience usually required of persons holding these offices.” It seems clear that these qualifications and this experience were of no use; not only the Judge of First Instance, but the Judges of the Court of Session, were of opinion that the then duly qualified persons were ignorant of the essentials of their business. The statutory rules required a competent person to be appointed. This was not done in any relevant sense. We do not wonder that, in these circumstances, the House of Lords reversed the decision of the Court of Session. Our surprise is reserved for the decision of the latter, which made competence and ignorance compatible. It would have been, as Lord Shaw points out, frustrating the plain intention of the Legislature to allow the judgment absolving the defendants to stand. Here, as so often happens, the impression of the Judge of First Instance, not bemuddled by argument and authorities, proves to be right.’ . . .

The conflict of Courts, with all that it connotes; the overlapping of Common and Statute Law; the uncertainties of the jury system; the bemuddling of weak Judges with strongly sophistical arguments; the further bewilderment of the same Judges among conflicting authorities—the *auspicia pullaria* of the Law Courts—as distracting as the movements of the sacred chickens must have

been to the Roman augurs when in search of a precise indication ; add to these the crowning mercy of the Legalist—loosely worded Acts of Parliament, and we find a perfectly co-ordinated series of conditions which cannot be surpassed if their deliberate purpose were to extract the maximum tribute from the public, and at the same time to preserve an elaborate and hypocritical semblance of Justice. We know that there was no such deep and dark design working in a clandestine manner throughout the ages. But we do know also that the practical effect on the public is precisely the same as if that dark and deep design had been conceived and successfully executed. We know, moreover, that those special pleaders—they are neither few nor feeble—who trumpet the excellence of this system, with the mental reservation that it is an excellent system only for the legal caste, are laying themselves open to the charge which M. Chailley levels against Legalism in India : that ‘ it is sucking the substance of the people.’

The following figures are given on the authority of the *Daily Mirror* of August 4, 1910 :

The cost of the trial, ending in acquittal, of Hubert Wood, charged with the Camden Town murder, was £3,000.

The Treasury spent on the trial on which Mr. Henry J. Lawson was convicted and Mr. E. T. Hooley acquitted £3,959 18s. 8d. The Mile End Guardians’ trial cost £3,885. That of the managers of Poplar and Stepney Sick Asylum cost £1,342.

There is much grumbling occasionally at the expense of law to private litigants. But those who are fortunate enough to keep out of litigation have less reason for self-congratulation than they imagine. They forget that the expense to the Treasury falls upon the ratepayers. Much of this outlay might be saved if the Attorney-General and Solicitor-General prosecuted in person instead of briefing highly paid counsel. Both these legal mandarins receive



liberal emoluments and they have no administrative departments.

This is an extract from Mill's 'British India': 'A Select Committee of the House of Commons in 1810 applauded a measure for the repression of litigation by increasing legal expenses, such as exacting a payment at the beginning of the suit, etc. No proposition derived from political experience may be relied on more confidently than this: the multiplication of law suits is a proof of the bad administration of Justice. A perfect administration of Justice would almost annihilate litigation, and the attempt to reduce it by other means, such as that of expense, is to hold out encouragement to plunderers and deny protection of law to the honest and the just.'

Lord Brougham said: 'A Law may be bad because it may bear the plain mark of sinister interests and those, not only of lawyers, called on this subject by Crimwell "the sons of Zeruiah".'

In Mill's 'British India' we read: 'When Legislators propose to drive people from the Courts of Justice by expense, they must of necessity imagine that it is the dishonest parties only whom the expense would deter; for it would be dreadful to make laws to prevent the honest from obtaining Justice. But is it easy for the wit of man to frame a proposition stamped with stronger characters of ignorance or corruption? That to render access to Justice difficult is the way to lessen the number of crimes!

'What is the greatest encouragement to injustice? Is it not anything which tends to prevent immediate redress?

'In all systems of procedure which by technical forms render the judicial business complex, intricate, full of snares and subtleties, the chance of success to injustice in a vast majority of cases is very great. This chance, most

assuredly, is a producing cause of a vast proportion of law-suits.'

The following extracts are from the *Reichsgesetzblatt*, the German *Imperial Law Journal*, No. 25, 1898 :

'The judgment must be signed by the Judges who assisted at the deliberation. Should one of them be prevented from signing, the reason of the hindrance is to be noted on the judgment by the others. . . . A judgment which may not be in correct form at the time of its pronouncement must be handed in perfect form to the Clerk of the Court within a week. The Clerk of the Court has to enter the date of the pronouncement on the judgment and sign the entry.

'The Clerk of the Court will then enter the signed judgment in a Register. The Register is to be hung up in the office of the Clerk of the Court for a period to be fixed by the Judges, and not to be less than a week's duration.

'The delivery of copies of the judgment occurs on the application of the parties to the suit. These authorised copies are to be signed by the Clerk of the Court and stamped with the Court seal.'

It is decreed elsewhere that the charge for copies of judgments is at the rate of 2½*d.* per sheet of twenty lines.

If these meticulous directions have the appearance of the technical formalism of which we complain in this country, it is important to observe the distinction. It is vital. Our formalism presents a series of snares and pitfalls for the litigant ; whereas German precision is directed to his convenience. There is no better illustration of the contrast than the circumstances attending the last incident in a trial.

When judgment is delivered in this country, the parties hear it if they are in Court. But in such an important matter they naturally desire to possess a copy of the exact words used by the Judge. This is still more

necessary when there is a dissenting judgment. Every word in both utterances has to be weighed. The unsuccessful litigant has to make up his mind whether he will accept the arbitrament or enter an appeal. The winner is almost equally interested in the exact terms of the judgment. He may have to fight an appeal; he may feel disposed to offer terms; the judgment may favourably affect kindred interests in another country. Will it be believed that both winner and loser are equally unfortunate in the fact that neither can obtain an authoritative copy of the judgment notwithstanding the heavy sums in which both have been mulcted?

The solicitor or his clerk may have taken a shorthand note. Counsel has noted the leading points. *The Times* of the following day will contain a report. After many weeks a printed report will appear in the record of cases. But an official copy of the judgment, signed by the Judge or Judges and stamped with the Court seal, is not to be obtained for love or money. The litigants are left to the tender mercies of third parties, such as the Court reporter, the shorthand writer, the newspaper, the solicitor's notes and impressions, counsel's recollection. Even if a verbatim report is specially provided and paid for, it is not official. There is no proof of the judgment that will be accepted as valid by a foreign tribunal; and in international business this is a grave disability inflicted on the natives of this country, or on foreign litigants who appear before our Courts. The fact is that throughout the whole domain of Legalism the litigant is the last person to be considered. He pays the piper, but he does not call the tune. Nor can he obtain, at first hand, an exact statement of what has been decided about his interest. All is vague, fragmentary, ill-defined. He is always in the hands of intermediaries.

Our readers will not fail to contrast this treatment with the business-like provision made in Germany. There

a diametrically opposite course is adopted. All efforts are designed to render the litigant independent of assistance. All intermediaries are eliminated. The hearing has cost the litigant a tithe of what he would have had to disburse in this country. And an appropriate conclusion to a trial is the certainty of procuring an official copy of the judgment in exchange for a trifling sum, and the almost equal certainty that the judgment will not be reversed.

In the matter of Court fees in Germany, the scale is fixed by the following decree, published in the 'Reichsgesetzblatt,' No. 25, of 1898, page 659; the scale applies throughout the German Empire:—

'There is no levying of stamps or other charges whatsoever beyond the under-mentioned fees.

'Documents of which use is made in the case are subject to a stamp or charge only in so far as they would be without such use.

'Documents which have arisen out of the case are subject to the ordinary stamps and other charges, so far as their contents go beyond the subject-matter of the trial.

'The institution of proceedings, or notice of appeals, can be effected at the Registry of the Clerk of the Court, or by correspondence, without the intervention of a solicitor.

'Tribunals are authorized to reduce fees for proceedings taken in error when no blame is attributable to the parties; and for refusal orders, when the application is due to ignorance or inexperience, no charge is made.

'The minimum Court fee is 20 pfennige (100 pfennige = 1 mark = 1 shilling). Amounts in pfennige which are not divisible by ten without a remainder are rounded off into the next higher sum which is divisible by ten.

'In civil suits the charges are made in proportion to the value of the property in dispute.

‘ When the property in dispute is worth 20 marks, the Court fee is 1 mark. ’

‘ From 20 to 60 marks the fee is 2 marks 40 pfennige.

60	..	120	..	..	4	..	60	..
120	..	200	..	..	7	..	50	..
200	..	300	..	..	11	..		
300	..	450	..	..	15	..		
450	..	650	..	..	20	..		
650	..	900	..	..	26	..		
900	..	1200	..	..	32	..		
1200	..	1600	..	..	38	..		
1600	..	2100	..	..	44	..		
2100	..	2700	..	..	50	..		
2700	..	3400	..	..	56	..		
3400	..	4300	..	..	62	..		
4300	..	5400	..	..	68	..		
5400	..	6700	..	..	74	..		
6700	..	8200	..	..	81	..		
8200	..	10,000	..	..	90	..		

‘ For every 2000 marks of extra value, the fees are increased by 10 marks.’

The method adopted in the preparation of this scale will be grasped when it is seen that a fee of 1 mark, when the matter in dispute is worth 20 marks, works out at 5 per cent. But as the amount in dispute increases, the percentage of fees diminishes. A 10,000 mark case paying 90 marks, works out at .9 per cent. Similarly, a 12,000 mark case, paying 100 marks, works out at .83 per cent. A 20,000 mark case can be tried for an expenditure in Court fees of 140 marks, or .7 per cent. That is to say, that a case in which £1000 is in dispute can be tried for an expenditure of no more than £7 in Court fees.

When we turn to advocates’ fees, the scale is as follows, the fees being charged as before on the value of the matter in dispute :—

Up to 20 marks, fee 2 marks				
20	„	30	„	3 „
200	„	300	„	10 „
300	„	450	„	14 „
450	„	650	„	19 „
650	„	900	„	24 „
900	„	1200	„	28 „
1200	„	1600	„	32 „
1600	„	2100	„	36 „
2100	„	2700	„	40 „
2700	„	3400	„	44 „
3400	„	4300	„	48 „
8200	„	10,000	„	64 „

For each 2000 marks more, the charges increase by 4 marks up to 50,000. Beyond that figure and up to 100,000 marks, the increase is by 3 marks; and above 900,000, the increase is by 2 marks for each 2000 marks.

These are minimum charges. They cover the work done in the preparation of a case, or what would be called solicitor's work in this country. They are to be doubled for an appearance in Court. The distinction between solicitor and barrister does not obtain in Germany.

There are further charges calculated at so many tenths of the scale quoted above, when there are witnesses.

It must be understood that these are taxed costs. About ordinary fees, the litigant makes his bargain with the solicitor-advocate. But, obviously, there is little inducement to pay fancy fees when there is no jury and no temptation to indulge in histrionic arts.

Let us take a simple case where there is an appearance in Court but without witnesses; the matter in dispute is supposed to be of the value of 10,000 marks, say, £500.

The Court fee is .. .. .	£4	10	0
Solicitor's and advocate's .. ..	£6	8	0

Maximum taxed costs for the loser—Total £10 18 0

There is also a scale for bailiff's charges :—

On property worth	50 marks,	1 mark
" " "	200	" 2 marks
" " "	300	" 3 "
" " "	1000	" 4 "
" " "	5000	" 5 "
" " " over 5000	"	6 "

The ordinary run of witnesses receive from 10 pfennige to 1 mark an hour.

The advocate is allowed 12 marks a day, in addition to travelling expenses during absence from home. These are taxed costs.

In criminal cases the advocate receives fees on the following scale for the defence :—

- (1) Before the Court of Aldermen .. 12 marks
- (2) Before the Criminal Court .. .. 20 "
- (3) Before Assizes or Supreme Court .. 40 "

Here it is to be noted that, notwithstanding the extremely moderate scale of legal charges, litigation does not run riot in Germany, as it does in the Anglo-Saxon world. And why ? Simply because the jurisprudence of Germany, like that of France, is broad-based on general principles—there are those who claim that the correct term is 'scientific principles'—not upon an inextricable tangle of cases. There are no juries in civil causes. This does away with much of the uncertainty which is a great inducement to vexatious litigation. Instead of a jury, there is a Bench of Judges administering a code which admits of as little uncertainty as possible. There is practically no gambling in litigation in Germany.

Proceedings of a vexatious character are sternly discouraged by the following provision. It is paragraph 93 in the 'Imperial Law Journal,' mentioned above :—

'If the defendant has not given occasion to the action ;

if he has promptly recognized the claim, the costs in the action fall upon the plaintiff.'

Throughout these well-considered provisions there is the strongest evidence of an enlightened, an unwearying solicitude for the public interest. Our special pleaders call it grandmotherly legislation. Wolves have never yet approved of sheep-dogs, much less of shepherds.

Our readers will do well to compare the regulations cited above with the following extract from the *Pall Mall Gazette* of December 29, 1910.

Under the heading 'Counsel's Fees' we read:—

'When the Law List contains the names of 13,000 barristers, whereas there is barely work enough for 300, it follows as night the day that only one here and there can hope to hold a winning card.

'Perhaps counsel themselves are not wholly blameless for the forlorn prospects which the new century holds out to the "*noblesse* of the robe."

'As a writer in the *Solicitor's Journal* recently pointed out, there is a tendency for counsel's fees to increase in amount.

'In the early days of Serjeant Ballantine, as that celebrated advocate tells us in his "*Experiences*," there was a recognized half-guinea fee for applications of a purely formal character. Nowadays the barrister who accepted such a fee would be promptly dealt with by his benchers. Again, in the days of special pleading the opinion of a pleader could be had for six-and-eightpence. To-day the minimum fee for counsel's opinion is "*one-three-six*"; and as a rule counsel's clerk insists on the double guinea.'

And so the work of raising the tariff wall round Justice goes merrily forward. This is the place to point out that the rise in physicians' fees is not on all fours with those of barristers. We are aware that certain medical baronets have recently raised their consulting fee to three guineas. But there are many practitioners who are willing to



receive half a guinea, or even less. They have complete liberty of action as regards fees. Barristers have no such liberty. Their right to plead depends on the benchers, who constantly endeavour to raise the scale of fees in the interest of the Senior Bar.

A little reflection will convince the reader that there are grave reasons which should prevail with the Government of a well-ordered State for putting the legal profession in a special category, subject to special ordinances. As it is of supreme importance that Justice should not be made inaccessible in narrow class or professional interests, we have put the legal profession—or rather they have put themselves—in a special category, with special provisions ; but these are one and all in their own interest, not in that of the public. Such is the pernicious condition which obtains in this country.

It is true that in Germany the solicitor-advocate is free to fix his own fees ; but observe what pains the Government takes to render the public as independent of him as possible. The Government has taken infinite trouble to provide a code which is said to be an almost perfect work of its kind. Such a boon is inestimable. To a great extent it makes every man his own lawyer. Observe, too, that every encouragement is given for litigants to appear in person. Further, juries were abolished entirely in the public interest. Germany is a well-ordered State for the layman ; England is a well-ordered State for the lawyer.

In the *Imperial Law Journal* of Germany, No 30, of 1909, it is decreed that ‘ the charge for documents to be made by Courts of Law is fixed at 20 pfennige per page of 20 lines, even if the documents are typewritten. Each portion of an unfinished page to count as a full page.’

In the same number there is further evidence of the Government’s extraordinary consideration for the interest of the public ; it is decreed that :—

‘ The fees advocates may charge for appearing in

Court in unopposed cases are to be only six-tenths of the previous statutory fees.'

In France the advocate makes his own terms with his clients. For the notary, there is a fixed scale of fees. They were first fixed in 1807.

There is no scale of fees for advocates in Belgium. The usual fee is about 10 per cent. of the property in dispute—probably with a sliding scale, although our authority does not say so.

According to Belèze, the profession of advocate is incompatible not only with the functions of Judge but also with those of *préfet*, *sous-préfet*, etc.

The following letter appeared in *The Times* of January 20, 1912: 'I think the following experience may be of sufficient public interest to warrant attention in your columns. One of our clerks attended at the Old Bailey on a subpoena no fewer than eight days between the 8th and 23rd instant; and had to be at call each day during that period. His evidence was not connected with the particular offence for which the prisoners were ultimately convicted, and would only have amounted to stating that a certain cheque form was not issued to the prisoners. It happened that he was not called to give any evidence. Three of the wasted days were spent in waiting for the grand jury to reach the case, and much of the whole delay arose from it being shifted from one list to another no fewer than four times. I understand from a professional man who was also dancing attendance for the same period that he made a strong protest to a high official, but he was informed that nothing could be done to remedy matters until the interest of those in influential quarters was brought to bear on the responsible powers that be. Hence the appeal, Sir, to you. The particular case was an ordinary police prosecution, and our clerk gathered that as influential counsel

were not engaged by private prosecutors, it would have to take its chance. This procedure cannot be in the public interest—one frequently comes across instances of wrongdoers benefiting by the apparently justifiable dread of the delay and expense incidental to prosecutions—and is most vexatious to all so unfortunate as to be caught in its toils.—(Signed) BANK MANAGER.’

Apparently those arrangements, such as changing a trifling case from one list to another three or four times, are made to suit distinguished counsel. The public is not considered in the least. The servants have become the masters.

The following is an official statement, under date January 16, 1912, of the cost of the legal establishment of the German Empire :—

‘So far as the legal establishment of the Empire is concerned, its annual cost according to the latest publications in the possession of this Office is 2,859,600 marks <sup>1</sup> for the Imperial Supreme Court of Appeal (Reichsgericht) and 548,900 marks for the Imperial Supreme Military Court of Appeal (Reichsmilitärgericht). The establishment of all other Courts in Germany belongs to its separate Federal States, provided that the cost of the inferior military Courts are refunded to the Federal States out of Imperial funds.’

In the *Daily Mail* of June 14, 1912, we read : ‘The hearing of the claim of the National Telephone Co. for nearly £21,000,000 in connection with the transfer of their telephone system to the State is costing approximately between £150 and £200 per hour. Yesterday was the fourth day of the hearing ; it may last for six weeks.

‘The preparation of the inventory for the hearing engaged six hundred men for close on eighteen months and cost approximately £230,000 to £250,000. Every morning as the hearing proceeds, a neatly bound printed

<sup>1</sup> £142,980.

record of the previous day's proceedings is in the hands of the parties in the case. The piles of documents have already reached a height above which the heads of the counsel in the first row only just appear.

In another case tried about the same time we read that the expenses were £1000 a day. 'The plaintiffs were the Osram Lamp Works (Limited), who alleged infringement by the defendants, the "Z" Electric Lamp Manufacturing Co. (Limited). Notices of appeal were given on both sides.'

'As to the relative cost of litigation in France and England.' Under this heading we give an extract from a paper contributed to the Conference held at the Palais de Justice, Paris, May 31, 1912, by Mr. Ernest Todd, Barrister-at-Law, London. 'I now propose to compare the relative cost of civil proceedings in France and in England, and to point out what, in my view, brings about the enormous difference in cost in the latter country, owing to the method there in force. The first point to consider is the method whereby the client is enabled to get his case prepared and presented for the Court's consideration. In France he usually goes direct to his *avocat*, who is entitled to see and advise him direct, to take from him all his documents and instructions, to get up his case by presenting and collecting other documents and seeing persons who can throw light on the case and who, when all is done, can put the whole into writing in the form of a pleading (conclusion), and then represent his client in Court and plead the case on his behalf. No witnesses being heard before the Court in civil (as distinguished from commercial cases) in France, everything being reduced to writing beforehand, it stands to reason that the expenditure in time and money is reduced to a minimum, and the reason of these conditions precedent the *avocat* knows with reasonable certainty what amount of work he can be called upon to perform, and can therefore fix a fee

which he can afford to accept from his client to cover the whole matter. This procedure, from the point of view of the English practitioner, appears to leave out of consideration two most important items in the proof of cases which frequently arise in practice, viz., where it is necessary to call witnesses as to facts and as to expert knowledge. These two needs in procedure are by no means ignored or lost sight of in France, but instead of calling the witnesses before the judge and jury and having them examined and cross-examined at great length, in the first case under Articles 252 to 294 of the Code of Civil Procedure, this is fully provided for by means of an inquiry (*enquête*), which is held before a Judge deputed by the Court before which the action is pending, to hold the same. As a preliminary to this, the party desiring proof in this manner must make application to the Court, which need not be in writing, stating what the facts are which he wishes to prove. Upon this application being made, on notice to him, his opponent must within three days state whether he admits or denies his adversaries' assertions; if he admits them—well and good, they form part of his adversaries' admitted facts; if they are denied, then assuming the Court finds the facts when proved are admissible in evidence by law, it will appoint a judge and direct him to take from the witnesses, called by both sides, such evidence as they may be able to give in regard to the matter. This inquiry is held under the entire control of the Judge appointed by the Court for the purpose, and although the parties and their advocates may be present, they are not allowed to put any question to the witnesses or to interfere in the proceedings, except by suggestion to the judge, who may adopt or ignore the suggestion as he thinks fit. After the examination, the depositions are read over and signed by the witnesses and then forms one of the documents in the case, upon which the parties' counsel on each side form their written pleadings and their verbal arguments. Expert evidence is obtained

somewhat in the same way. . . . The result of this procedure in practice is to reduce the cost of litigation in France to a minimum, so that an ordinary civil suit which is defended, but in which there is no extraordinary complication, can be carried through at a cost to the client (who pays his own costs except the tariff allowance to the *avoué*) of anything from £29 to £50, depending largely upon the eminence of the advocate he employs.

‘Now let us compare this simple and inexpensive procedure with that in force in the High Court in England, under the Judicature Acts and Rules of Court. We will take two typical kinds of action: the first for £500 for goods sold and delivered, in which the question is raised by the defendant that the goods are not up to sample or description; the second on a builder’s account for work and labour done and materials supplied, under a contract in writing, to build a house for £1000, and for extras on the contract amounting to another £500, in which the defendant raises the defences that the main work has not been carried out in accordance with the contract, and that some of the items sought to be charged as extras are included in the £1000, and that the prices charged for other items are excessive and unreasonable.

‘The first thing to be done is for the client to consult his solicitor, to whom he will hand all the documents and correspondence; the solicitor will then enter into what may turn out to be a very lengthy correspondence with the other side’s solicitor, with a view to arriving at a settlement of some or all the questions between their respective clients. Assuming that no understanding is arrived at as to the whole claim, then an action in the High Court will probably be decided upon and a writ will be issued. This, after appearance by the defendant’s solicitor, will be followed by a statement of claim prepared by a barrister upon the instructions in writing of the solicitor. To enable the barrister to prepare this document, the solicitor will

have had copies made of all the relevant documents in his client's possession, including the whole of the correspondence ; and possibly before it can be satisfactorily put into form, they will have had one or more interviews, all of which have to be paid for separately to each. When the statement of claim is delivered, the defendant's solicitor will probably want more particulars than are contained in that document and will issue a summons for that purpose, which he will instruct the barrister to attend and conduct ; and when the order is made, the barrister will again be paid a fee for settling the particulars which are delivered, as these, to all intents and purposes, are incorporated in and form part of the original pleading. When the defence comes to be delivered, probably the same procedure as to particulars will be gone through in regard to it. When the pleadings are closed, the parties will want to see each other's documents, and upon application to a Master in the Supreme Court an order will be made for each party to make and file an affidavit within ten days, stating what documents relating to the matters in question are in their respective clients' possession. After this has been done, each side will inspect each other's documents and will take copies of those which they do not already possess. When this stage is reached, a case will probably be prepared by the solicitor and laid before the barrister, to advise what is necessary in the way of evidence to prove the client's case in Court, and if there are points raised by the claims or defence which it will be difficult or expensive to prove by the attendance of the necessary witnesses, interrogatories to the opposing party may be advised. In this case the barristers will be instructed to prepare them and to attend before the Master and prove that they are proper to be allowed. When this has all been gone through and the case is ready for hearing, the solicitor will prepare the brief for the barrister (this being a statement in writing setting forth all the facts

and arguments in support of the client's case) which will be accompanied by a statement of what each witness will say and a copy of all the material documents. In cases of any magnitude, complication or importance, two barristers will be employed, the one who has drawn the pleadings and conducted the interlocutory matters as junior, and a K.C. as leader. Each of these will have to be supplied with a copy of the brief and of all the other relevant documents; and if the case is other than a comparatively simple and short one, the leader will be paid a fee of £52 10s., and the junior £36 15s., to conduct the case in Court. If the case lasts more than one whole day, the leader will probably be paid £21 and the junior £16 5s. refresher fee for every whole day that the case takes to try. . . . The net result of this procedure is that the costs of each party will amount to at least £300 and probably double this amount; if the case lasts several days, from £60 to £70 per day being added for counsel's, solicitor's, and witnesses' fees while the case lasts, so that the unsuccessful litigant, whichever he may turn out to be, may find that having lost his case he is ordered in addition to pay his opponent's costs. Suppose therefore that the plaintiff in either of the specimen cases above alluded to is ordered to pay the defendant's costs, he will be deprived of the whole sum which he sought to recover and will have £600 and probably nearer £1000 for costs to pay to his own and his opponent's solicitor. Even if he is successful in recovering his £500 or £1500 claim, he will still have to pay what are known as solicitor and client costs to his own solicitor, which will probably reach at least £100, these being charges which cannot be recovered against the opponent as "party and party" costs. From the figures given above it will be noticed that there is a very great disparity between the costs of similar civil proceedings in the two countries, the object of and ultimate result to the parties (except as to the cost of arriving at it) being the same, and two questions appear to arise out of these circum-



stances which demand an answer. These are : (1) What is it that makes the English procedure so much more expensive ? And (2) does this greater cost synchronize with greater efficiency ? The answer I suggest to the first question is, that the great cost of English procedure is, firstly, attributable to the division of the legal profession in England into the two branches of barrister and solicitor, causing the duplication of every step and detail ; and, secondly, that the proof is allowed *virâ voce*, with the control of the suit in the hands of the solicitors instead of in that of the Court.

‘I fail to see how any greater efficiency is obtained under the system in vogue in England over that in vogue in France . . . we have the undoubted fact that the rights of the parties are determined to the satisfaction of the parties themselves, that the procedure is more rapid and less expensive, and that those who have been subject to it for many years are content with it and do not crave to be allowed to have the benefit of ours. . . . I suggest that as a beginning to necessary reforms, the two branches of the profession should be amalgamated and that experts should be appointed by the Court to report to it and should no longer be appointed by the parties and subject to cross-examination.’

That the French ‘do not crave to have the benefit’ of our legal system is admirable !

In the Archer-Shee case the country was called upon to meet a large item for indemnity. Between sea-lawyers and land-lawyers every conceivable blunder seems to have been made. The claim advanced by the boy’s father was largely augmented by the action of the Government in successfully opposing the hearing of the case on its merits in the Court of King’s Bench. Well might Mr. Lyttelton, in the House of Commons, characterize this action as a disastrous exercise of discretion. It involved the family in heavy legal fees and a very expensive

second trial. Here we have an instance of the danger of surrounding Justice with a high tariff wall. In a similar predicament a family whose means were more limited would have had their boy branded as a thief for the rest of his life. This case brings home to us the true inwardness of our so-called Department of Justice. Having been captured by the Bar, it has been completely subverted from its purpose and now subsists for masking legal blunders, not for amending them. In this case, too, is seen the grave divergence which exists between the lawyer's case and that of the layman. One of the Crown lawyers opposed the hearing in the first instance. When the defence had to be abandoned and an enhanced claim for damages was incurred, the same dignitary expressed in the House of Commons his personal satisfaction and that of the Government that the boy's character had been vindicated! Presumably this kindly and sympathetic gentleman was consulted by the Government before taking the disastrous course mentioned. At all events, he was instructed to take that course. In either case more than an ordinary measure of professional effrontery is required for this feat of running with the hare and hunting with the hounds. After all, the Archer-Shee claim is a small item in the large price that the country is content to pay for Legalism. That price is paid partly in money, partly in public apathy and mistrust arising from a deepening conviction that our vaunted Justice is becoming more and more a matter of sale involving huge fees to powerful advocates.

'M. Gavard, sometime French Minister here, whose letters appeared early in 1895 (*Un Diplomate à Londres*), speaking of the Tichborne case, says: "In the present state of English jurisprudence anything may be tried, even the proof that a hippopotamus is a gazelle: all that is wanted is sufficient funds, that is to say, a good syndicate to play with legal proof."'—Quoted in 'A Chance Medley.'

‘ Baron Langdale (1783–1851), Senior Wrangler and Smith’s Mathematical Prizeman, 1808. Appeals from his decisions were few and rarely successful. To every Bill that tended to render Justice more easily accessible and to diminish its expense he gave a most hearty support and urged with unanswerable arguments the injustice of taxing the suitor with fees towards the establishment and support of the Courts and their officers.’—*Foss’s Judges*.

‘ When the tongue became an article of sale, the disrepute attaching to the person of the advocate soon extended to the profession itself ’ (Grellet-Dumazeau, ‘ Le Barreau Romain,’ p. 71). ‘ In the last years of the Republic the exigencies of advocates knew no bounds, and pleading had become a species of traffic. The scale of fees had been’ limited by law to 10,000 sesterces (2000 francs) as a maximum; but the rapacity of the advocates, momentarily repressed, had only become more audacious. During the reign of Claudius, a Roman knight had paid the advocate Suilius 400,000 sesterces for undertaking his defence. The advocate, however, tempted by a still larger sum from his client’s accuser, accepted the bribe and threw over his client, who committed suicide in despair ’ (p. 125). ‘ Martial is full of sarcasm, which shows to what degree of disrepute the profession of advocate had fallen in his time.’

*The Times* of August 17, 1912, contains the following intimation:—

‘ The King has been pleased by Letters Patent under the Great Seal, bearing date the 10th inst., to grant unto the Right Hon. William Snowdon Baron Robson, G.C.M.G., late one of the Lords of Appeal in Ordinary, an annuity of £3750 for life, commencing from the 1st day of August, 1912, inclusive and payable quarterly.’

In an article by Mr. Arnold White, the distinguished

publicist, in the *Daily Express* of September 2, 1912, headed 'The Scandal of Lawyers' Fees,' the following passages occur :—

'In his standard work on the House of Commons Sir Reginald Palgrave says "By God's Providence we never had in England a privileged class."

'Those who were present at the *Titanic* inquiry do not share Sir Reginald Palgrave's opinion. The lawyers of the House of Commons do form a privileged class. Since Parliament parted with the power of the purse the lawyers have increased their power, their remuneration and their ascendancy over laymen, whether dukes or dustmen. The *Titanic* inquiry, as illustrating the lucrative side of the trade of politics, was an object-lesson and an eye-opener to those with eyes to see and ears to hear. This sort of dialogue was frequent :—

"Commissioner : Then it was a calm night ? "

"Witness : Yes, it was quite calm."

"Commissioner : Then we may take it that the sea was smooth ? "

"Witness : Yes, the sea was quite smooth."

"Cross-examining Counsel : Do I understand you to say that there was no wind ? "

"Witness : I did not notice any breeze."

"Counsel : Then the sea was flat ? "

"Witness : Yes, the sea was quite smooth."

"Counsel : Are you sure of that ? "

"Witness : Yes, I am quite sure."

'At that point another counsel would proceed to ask similar questions in a similarly leisurely way. . . .

'Let us see what this means. On the face of things it would seem that the public may be indifferent to the needless prolongation of any inquiry in which the Attorney-General and his juniors are briefed by the Treasury. Every minute wasted, however, in needless talk or avoidable delay means a steady stream of golden sovereigns pouring from the pockets of the middle and working

classes into the pockets of a class that may now be fairly described as privileged.

‘It is reported that the Attorney-General and his colleagues received a sum of thirty thousand pounds for their invaluable services at the *Titanic* inquiry. Whether that is true or not I cannot say, but we know that the Attorney-General, the Right Hon. Sir Rufus Daniel Isaacs, K.C., M.P., receives a salary of £7000 a year, ‘AND FEES.’ . . . Is the work worth the money ?

‘Ten years ago the Attorney-General only received £15,183. Apparently the lawyers in Parliament grew frightened lest the gorge of the public should rise at so monstrous an over-payment of a profession which is assuming the powers that were wielded by an avaricious and ambitious priesthood in the Dark Ages. A year or two later, the emoluments of the Attorney-General rose to £20,000. In the interest of the lawyers it was then found advisable to conceal from the public the major portion of the money extracted from the taxpayer by the Law Officers of the Crown and the swarm of expectant placeholders by whom they are surrounded on the benches on both sides of the House of Commons. From that time forth, accordingly, Mr. Attorney and Mr. Solicitor have drawn salaries of £7000 and £6000 respectively—AND FEES.

*‘What I want to know is, what the fees of the Attorney-General for the Titanic inquiry actually were.*

*‘What is the Attorney-General drawing in the way of cash from the interminable Telephone inquiry ?*

*‘What sum of public money has been paid to legal members of the House of Commons in respect of their services in the Marconi contract ?*

‘Unscrupulous adventurers are sometimes needy ; they are more often rich. Rich adventurers do not always find it necessary to enter the House of Commons in order to manipulate public opinion, to arrange public contracts, and to secure from the public advantages for themselves

which can only come in legal form through the action of Parliament. . . .

‘Although a financial magnate who would obtain control of the British Treasury need not necessarily be a member of Parliament, it is indispensable to obtain the support of the legal members of Parliament. These gentlemen hang together. What is a successful lawyer ? He is a man who for twenty years of his life has hired out his mind for the purpose of advocating the case of anyone who will pay him for doing so. . . .

‘No layman understands an Act of Parliament. The more obscure the Act, the more profitable the harvest of litigation. . . .

‘Their motives may be innocent, their hearts pure and their “honour” untainted, but the effect is to throw lucrative jobs into the hands of a profession which Lord Brougham once described in language which would disgrace a gorilla. . . .

‘Lawyers and financiers have it in their power to force on, or avoid revolution. Illegitimate, harsh and unconscionable profits in the one case ; in the other secret and excessive fees wrung from the pockets of ignorant taxpayers with the connivance of an impotent, because paid, House of Commons will do more to bring on the Red Terror than all the Ben Tilletts and Tower-hill mobs in the world.’

## APPENDIX F

‘The Judges in ancient Rome were chosen at first from among the senators. The Gracchi extended the choice to the knights. Drusus to senators and knights together. Sylla restricted the choice to the senators. Cotta extended the recruitment of the Bench to the officers of the public Treasury. Cæsar excluded these.

Antony extended the choice to centurions.'—*Montesquieu's 'Esprit des Lois.'*

Apparently there was never any question in Roman history of advocates being promoted to the Bench.

In 'Notes from the Life of an Ordinary Mortal,' by Mr. A. G. C. Liddell, C.B., we read: 'February 25th, 1881. At 12 this night Courts of Common Pleas and Exchequer breathed their last (*Diary*)'

#### PRESENT-DAY COMMENT.

'This change which saved a few thousands a year has not, in my opinion, been followed by the good results expected by its authors. It has substituted for these Courts, each under the immediate control of its chief, an unwieldy body of Judges supposed to be kept in order by a *divisum imperium*, consisting of the Lord Chancellor and the Lord Chief Justice. It has abolished the two chiefships which attracted the best men at the Bar, who are now unwilling to take Judgeships, a state of things which has the double evil of diminishing the supply of good men for the Bench and giving an undue prominence to the Bar, *it being not uncommon now for a Judge to have before him an advocate whose pupil he has been*' (p. 191).—[The italics are ours.]

In *The Times* report of the East Dorset election petition, in the issue of May 12, 1910, there is an admirable instance of the brotherly feeling of the Bench for the Bar.

'Mr. Justice Pickford: One of the Judges has said that the election begins "when a man throws his hat into the arena." "To throw down the gauntlet" would be more dignified.'

'Counsel: I am far from saying that the views of all the Judges can be absolutely reconciled.'

'Mr. Justice Lawrence: It would be a very bad

time for the Bar if they were. (Laughter.) The Judges have always been most benevolent to the Bar.'

Of that there can be no doubt. This particular form of benevolence assumes the form of perfectly friendly agreement to differ, which assures the frequency of appeals, fresh trials, etc. Solicitors also participate in this benevolence. But how about the litigant? How about those who pay for this vast paraphernalia of Legalism? Are their interests ever considered at all? There is no proof of it forthcoming.

At the annual meeting of the Bar in 1910, a Resolution in favour of shortening the Long Vacation was lost and the present arrangement affirmed according to which the Courts rise on July 31 and resume on October 12.

In supporting the Resolution Sir Edward Clarke said :—

'There were two classes of opponents. There were the leaders who were highly paid and who enjoyed long holidays because they could easily afford to pay for them; and there were also many young men at the Bar whose private means were sufficient to make them prefer the holidays to the sittings, and for that reason they were never likely to be conspicuous or influential in their profession. To the man who was earning a moderate income by hard work at the Bar it was not fair that he should have to spend a long time in expensive holidays. A holiday meant that the income ceased and the expenses doubled. For nearly fifty years the solicitors had urged that the Long Vacation should be between August 1 and September 30. When the motion was declared lost, Mr. Bentwich suggested a Referendum; but the Chairman, Sir Rufus Isaacs, did not reply.'

This is the place to point out that solicitors as a body offer strong opposition to that parasitical oligarchy, the Senior Bar, on two points—these are the Long Vacation



and the formation of an Imperial School of Law. But if the solicitors form a solid phalanx in support of the oligarchy that misrules us on all other points such as codification, registration of title, the jury system, the method of recruiting the Bench, it is obvious that agreement so far outweighs divergence as to leave the Bar's composure undisturbed. Under these circumstances, solicitors will probably go on protesting against the Long Vacation for another half-century for all the effect their unaided efforts will produce.

*The Times* of February 6, 1911, devotes a leading article to the subject of legal education. A correspondent is quoted as saying that : ' A student can get called to the Bar who is ignorant of the first elements and principles of the profession which he is to practise, and who has never untied a set of papers or heard a witness examined in Court.'

It seems that Gray's Inn is now setting an example for the others to follow. Reading in practising barristers' rooms is to be encouraged. This is said to be a return to an older system which had its strong points. Moreover, the Universities are now making provision for teaching Law on lines altogether new. One might imagine the Inns had just been started and were getting into working order instead of being six centuries old.

The following letter appeared in the *Observer*. Our acknowledgments are due to the proprietor and editor for leave to reproduce it : ' We observe that the colour question has unexpectedly assumed an acute form in South Africa. Shall the Bar admit coloured members ? The Cape says " Yes " with unanimity. From the other Provinces there comes an emphatic " No. "

' Having regard to the policy of the Inns of Court and the practice in the East and West Indies, those who are determined to maintain the colour bar have an uphill

part to play, more especially as South Africa cannot be considered a white man's country.

'But it is well to remember that no subject turns so readily to embittered hostility—not even when the *odium theologicum* is invoked—as this *terrrima causa* of strife. Grave issues such as miscegenation are dragged in forthwith, and the controversy ends by leaving the disputants on opposite sides of a widening gulf. Anyone who knows the United States will bear me out in this forecast.

'There is, however, one way of effecting a compromise, if not an agreement. It is this: admit every shade of colour to the Bar from the blonde of Albion to the Day & Martin of the torrid zone; but let us cease recruiting the Bench from the Bar. In a playful mood Lord Macaulay conjured up the figure of a Lord Chief Justice with twins as a possible outcome of the Women's Rights agitation. We hesitate to guarantee that her ladyship, even if divinely fair, will be a *persona grata* on the South African Bench; but we do say that other things—we mean gifts and talents—being equal she would be preferred, outside Cape Colony, to any coloured gentleman whatsoever, despite the fact that he would readily receive the "call" of the Inns of Court and she would be absolutely barred.

'This is the real bugbear—the objection to a coloured Bench—because that is involved under the present system, not merely admission to the Bar. There is another point: a coloured Bench in South Africa connotes something fundamentally different from a coloured Bench in India, where there is an ancient civilization kindred in many respects to our own.

'There is a strong probability that all the South African States would accept the compromise suggested, namely, that the Bench should be white, and that the judiciary should be distinct and separate from the Bar, and should receive a special training for duties which are essentially different from those of the Bar. Quite apart from its

value as a possible basis of compromise, there is much to be said for this course.'

## APPENDIX G

The following instance of a technical decision and some of the *sequelæ* is from 'The Prisoner at the Bar,' by a New York State Attorney (Werner Laurie).

'It is not a crime in New York State to procure money by false pretences provided the person defrauded parts with it for an illegal purpose. In the McCord case, in which the Court of Appeal established this extraordinary doctrine, the defendant had falsely pretended to the complainant, a man named Miller, that he was a police officer and held a warrant for his arrest. By these means he had induced Miller to give him a gold watch and a diamond ring as the price of his liberty. The conviction in this case was reversed on the ground that Miller parted with his property for an unlawful purpose. . . . Thus the broad and general doctrine seemed to establish that so long as a thief could induce his victim to believe that it was to his advantage to enter into a dishonest transaction he might defraud him to any extent in his power.

'Immediately there sprang into being hordes of swindlers who, aided by adroit shyster lawyers, invented all sorts of schemes which involved some sort of dishonesty upon the part of the person to be defrauded—the "wire-tappers," of whom Harry Summerfield was the Napoleon; the "gold-brick" and "green goods" men and the "sick engineers" flocked to New York, which under the unwitting protection of Appeals became a veritable Mecca. The wire-tapping game consisted in inducing the victim to put up money for the purpose of betting on a sure thing, knowledge of which the thief pretended to have secured

by tapping the Western Union wire of advance news of the races. He usually had a "lay out" which included telegraph instruments connected with a dry battery in an adjoining room, and would merrily steal the supposed news off an imaginary wire and then send his dupe to play his money on the winner in a pretended pool-room which, in reality, was nothing but a den of thieves who instantly absconded with it.'

Mr. Arthur Train, the author of 'The Prisoner at the Bar,' is Assistant District Attorney, New York County. From many striking illustrations of the working of the jury system we extract the following :—

'The defendant in this case was a German, and the prosecutor succeeded in keeping all Germans off the jury until the eleventh seat was to be filled, when he found his peremptory challenges exhausted. Then the lawyer for the prisoner managed to slip in an old Teuton who replied, in answer to a question as to the place of his nativity, "Schleswig-Holstein." The lawyer made a note of it, and, the box filled, the trial proceeded with unwonted expedition. The prisoner was charged with having murdered a woman with whom he had been intimate, and his guilt of murder in the first degree was demonstrated upon the evidence. At the conclusion of the case, the defendant not having dared to take the stand, the lawyer rose to address the jury on behalf of what appeared a hopeless case. Even the old German in the back row seemed plunged in soporific inattention. After a few introductory remarks the lawyer raised his voice and in heartrending tones began : "In the beautiful country of Schleswig-Holstein sits a woman old and grey waiting for the message of your verdict from beyond the seas." (No 11 opened his eyes and looked at the lawyer as if not quite sure of what he had heard.) "There she sits in Schleswig-Holstein by her cottage window, waiting, waiting to learn whether her boy is to be returned to her outstretched arms. Had the

woman who so unfortunately met her death at the hands of my unhappy client been like those women of Schleswig-Holstein, noble, sweet, pure women of Schleswig-Holstein. I should have naught to say to you on his behalf. But alas! no; Schleswig-Holstein produces a virtue, a loveliness, a nobility all its own." (No 11 sat up and proudly expanded his chest. The fiscal Attorney found it quite impossible to secure the slightest attention from the eleventh juror, who seemed to be occupied in casting compassionate glances in the direction of the prisoner. In due course the jury retired, but they had no sooner reached the room and closed the door when the German cried, "Dot man is not guilty." The other eleven stood unanimously for murder in the first degree, which was the only logical verdict that could possibly have been returned upon the evidence. At last, worn out with their efforts, they finally induced the old Teuton to compromise with them on a verdict of manslaughter. The District Attorney was aghast at such a miscarriage of Justice. The defendant admitted, in answer to the questions of the Clerk, that his parents were both dead and that he was born in Hamburg.'

The same author gives numerous instances of freak verdicts. The following is one of the most inexplicable :

'Two men were seen to enter an empty house at dead of night. The alarm was given by a watchman near by, and a young police officer who had been but seven months in the force bravely entered the black and deserted building, searched it from roof to cellar and found the marauders locked in one of the rooms. He called upon them to open, received no reply, yet without hesitation, and without knowing what the consequences to himself might be, he smashed in the door and apprehended the two men. One was found with a large bundle of skeleton keys in his pocket and several candles, while a partially consumed candle lay on the floor. In the police court they pleaded

guilty to a charge of burglary and were promptly indicted by the grand jury.

‘ At the trial they claimed to have gone into the house to sleep ; said they found a bunch of keys on the stairs, denied having candles at all or that they were in a room on the top story, and asserted that they were in the entrance hall when arrested. The story told by the defendants was so utterly ridiculous that one of the two could not control a grin when giving his version of it on the witness-stand. The writer, who prosecuted the case, regarded the trial as a mere formality and hardly felt that it was necessary to sum up the evidence at all.

‘ Imagine his surprise when an intelligent-looking jury acquitted both defendants after practically no deliberation. The news of such an acquittal must instantly have been carried to the Tomb, where every other guilty prisoner took heart and prepared anew his defence. Those about to plead guilty and throw themselves upon the mercy of the Court abandoned their honest purpose and devised some perjury instead. Criminals, almost persuaded that honesty is the best policy, changed their minds. The barometer of crimes swung its needle from stormy to “ fair.”

‘ But apart from law breakers, consider the effect of such a miscarriage of Justice upon a young, honest, and zealous officer. All his good work, all his bravery, his conscientious efforts at guarding the sleeping public, had been disregarded, set aside with a sneer and had gone for naught. The jury had stamped his story as a lie ; stigmatized him by their action as a perjurer. They had chosen two professional criminals as better men. . . . As things stand to-day, a thief caught in the very act of picking a pocket in the night time may challenge arbitrarily the twenty most intelligent talesmen called to sit as jurors in his case. Does such a practice make for Justice ? . . . It is also conceivable that some means might be found to do away with the interminable technicalities which can

now be interposed on behalf of the accused to prevent trials or the infliction after conviction.'

Colonel Homer Lea, in 'The Valour of Ignorance,' says : 'Crime in the United States has become multitudinous and rampant. . . . Immigrants are less criminal in their own countries than in the United States. In 1906 there were in England, to each million of the population, eight murders committed ; in Germany, four ; in the United States, one hundred and eighteen. The average number of murders during the last twenty years was thirty times greater than the total number of men killed in the field during the Spanish-American War. The annual number of persons killed in the Civil War was but slightly in excess of persons now murdered each year in times of peace in this land, not of liberty but of licences. The cost of crime in the United States annually exceeds the entire expenditure made necessary by any of the American wars other than the Rebellion.

'In this Republic the Germans exceed all other foreigners in criminality, while in their native land, under a form of government suited to them, crime is reduced to a minimum.'

For 'a form of government' read 'a judicial system.' The German system, inasmuch as it has a code and a trained judiciary, withdraws from crime the charm of an attractive gamble. If the proof of the pudding is in the eating, here we have conclusive evidence on the comparative merits of the German judicial system and that of the United States, which is our own with its inherent vices developed into glaring abuses. We have seen that American lawyers are extremely eager to claim kindred between the legal systems on either side of the Atlantic. Our readers will not fail to contrast the passage cited with the extract from Mr. Choate quoted in the text.

Colonel Lea proceeds to demonstrate how this gamble

with Law cannot fail to produce national demoralization and thereby jeopardize international relations :

‘Denial of obedience to law,’ he says, ‘may occur collectively, if tendency to crime in the individual is prevalent. When it occurs collectively, by a section of the nation as against the whole, it is rebellion ; when it occurs collectively against international law and usage, it is war. The origin of the collective refusal of a nation to obey international law is very little removed, if at all, from the breaking of a local law by an individual, which is called a crime. It can be justly said that the criminality of a nation is a true index as to the proportionate probabilities of war having its cause in the acts and passions of people, and in ratio to the progression or retrogression of crime in a people may war, in so far as the people are productive of it, draw near or recede. . . . This Republic exceeds all other civilized nations in crime. . . . The diplomatic history of this Republic shows the fixed indisposition of the masses to view foreign relations except in subordination to their national or class interests. . . . The predisposing causes of a war with Japan are inherent in the overt acts of a portion of the people. . . . These Orientals are disfranchised and treated by the populace not alone with social unconcern, but indignity. Municipalities direct restrictive ordinances against them, so that they become the natural prey not only of the lawless element, but of the police. Their status being already fixed by public opinion, their voice in protesting against indignities may, in the beginning, be vehement, but their protestations soon break away in hoarse and broken whispers. They cannot appeal to the Courts where their case may be determined by a jury, for the jury, being of the people, has already decided that as heathen they cannot be believed under oath. It has come to pass on the Pacific Coast that the word of one Occidental is considered more worthy of credence than the oaths of an entire colony of Orientals. They have ceased to look for justice in cases



## APPENDIX G

determined by juries. State legislation further ~~deprives~~ them of any civil rights enjoyed by other residents. They are segregated and participate in none of the activities common to other aliens. In some parts of the country their presence is not tolerated, and they are stoned and driven out as though they were unclean. They become as racial lepers whose residence in a locality is permitted only by such isolation as the citizens and European aliens consider necessary. In this manner Orientals are not alone subject to individual maltreatment but to that of mobs. The motives, moreover, that actuate mob-lawlessness are identical with the spirit that directs municipal ordinances against them, the legislation of the State, and the injustice of the judiciary. . . . What has occurred to the Chinese will—as is now being done—be directed against the Japanese, but with this difference: the oppressive acts will be as much more violent as is lacking the submission characteristic of the Chinese. To expect the Japanese to submit to indignities is to be pitifully incomprehensive of their national character. And the American people should realize that it is this cumulative memoranda of wrongs that they must, on some certain sombre day, make answer to.'

This writer supplies a much-needed corrective to the special pleader. We see as in a glass darkly the possibility of grave complications due to the abuse of the jury system—the effacement of the Judge, the dangerous ascendancy of the Bar, and the strained and hypocritical enslavement to the letter of the Law.

In 'The Subtle Arts of Great Advocates,' by Mr. Francis L. Wellman, of the New York Bar, an interesting light is thrown on the methods of selecting jurors and the latitude allowed to the Bar. One chapter is headed 'Art in Selecting a Jury.' The author says: 'Not long ago in the Federal Courts I challenged peremptorily, a most intelligent-looking man. He hung round the

court-room all the morning session, and came up to me about one o'clock and asked apologetically if I would not mind telling him why I dismissed him from the jury. I replied pleasantly : ' I have not the slightest idea, except that while we were talking together, I had a sort of feeling that you and I would not get on.'

And so it is perfectly possible, nay more, it has actually occurred that a whole month is spent in constituting a jury owing to frivolous objections on both sides.

Mr. Wellman records an instance when ' the clerk of the old Superior Court used to take me into his private office, where, because of the peculiar construction of the place, it was possible to hear the deliberations of the jury in the room above. It was because of my semi-official position that I was accorded the privilege, and it was a great education.'

It must have been indeed a liberal education in the true inwardness of the jury system. This is what he heard on one occasion : ' I was listening to one of my own juries discussing a case I had just finished. A lady had fallen on the sidewalk and she was suing the city for personal damages. The foreman started the discussion. " Now, gentlemen," said he ; " before going over the evidence there are some points of law for us to consider." Whereupon a loud voice called out : " Oh, to h—l with the law ! How much shall we give the girl ? "'

Mr. Wellman tells his readers how to manage Judges as well as juries ; how to win the worst case and how not to spoil a good one. It is the concentrated essence of the wisdom of the serpent ; but whether it is associated with the harmlessness of the dove may be doubted. It is very amusing ; but it would be more enjoyable if we could forget that after long years of such arts and artifices the past-masters in them are promoted to the Bench. And then we affect surprise at the occasional vagaries of technicality ! We are shocked when common sense

is outraged and when the obvious meaning of words is strained beyond recognition.

Let us be just to those who administer Legalism instead of Justice. It is unreasonable to expect that they can free themselves from the trammels of their training. With decaying powers and increasing years, we must expect a certain reversion to the characteristic methods of youth, such as a keen attention to subtleties, a stressing of finicking defects of form. Nor are we disappointed. The aged Judge has a singular intellectual resemblance to the young Barrister. The wheel has come full circle. From the point of view of Justice, it is a vicious circle. But the fault is with the system—that is to some extent, reader, with you and me—rather than with the individual Judge.

The following extracts are from 'The Promise of American Life' (Macmillan, 1909): 'The Federal Constitution by instituting the Supreme Court as the Interpreter of the Fundamental Law, and as a separate and independent department of the Government, really made the American lawyer responsible for the future of the country. In so far as the Constitution continues to prevail, the Supreme Court becomes the final arbiter of the destinies of the United States. . . . Thus the lawyer, when constituted as Justice of the Supreme Court, has become the High Priest of our political faith. He sits in the Sanctuary and guards the sacred rights which have been enshrined in the ark of the Constitution. . . . But it is true that the most prominent and thoroughgoing reformers, such as Roosevelt, Bryan, and Hearst, are not lawyers by profession; and that the majority of prominent American lawyers are not reformers. The tendency of the legally trained mind is inevitably and extremely conservative. . . . The existing political order having been created by lawyers, they naturally believe somewhat obsequiously in a system for which they are

responsible and from which they benefit. This government by law, of which they boast, is not only a government by lawyers, *but is a government in the interest of litigation.* It makes legal advice more constantly essential to the corporation and the individual than any European political system. . . . They have corporations in Europe, but they have nothing corresponding to the American corporation lawyer. The ablest American lawyers have been retained by the special interests. In some cases they have been retained to perform tasks which must have been repugnant to honest men; but that is not the most serious aspect of the situation. The retainer which the American legal profession has accepted from the corporations inevitably increases its natural tendency to a blind conservatism; and its influence has been used, not for the purpose of extricating the corporations from their dubious and dangerous legal situation, but for the purpose of keeping them entangled in its meshes.

'At a time when the public interest needs a candid reconsideration of the basis and purpose of the American legal system, they have either opposed or contributed little to the essential work, and in adopting this course they have betrayed the interests of their more profitable clients—the big corporations themselves—whose one chance of perpetuation depends upon political and legal reconstruction. . . . Assuming some radical reorganization to be necessary, the existing prejudices, interests, and mental outlook of the American lawyer disqualify him for the task. . . . If there is any thoroughgoing reorganization needed it will be brought about in spite of the opposition of the legal profession. . . . The millionaire, the "boss," the union labourer, and the lawyer have all taken advantage of the loose American political organization to promote somewhat unscrupulously their own interests and to obtain special sources of power and profit at the expense of a wholesome national balance.'

This author's reference to the failure of criminal

justice in America is cited in the text. We are a lawyer-ridden race on both sides of the Atlantic, but the pre-eminence in this misfortune belongs of right to the United States. Ours is the second place. Other communities have taken wise measures against any temptation to enter into this egregious rivalry.

What our author calls a 'wholesome national balance' is impossible under the marked ascendancy of the legal caste. Our neighbours have found that such an unwholesome condition is prevented by ordaining that the judicial career shall be distinct and separate from the Bar. They find that by giving the occupants of the Bench a special training in an atmosphere entirely removed from that of the Bar, an efficient check is provided against narrow professional aims and the insidious technicalities which run riot in Anglo-Saxondom. We have, then, the favourable experience of our Continental neighbours in support of their policy. Not only so, but we have the disastrous experience of the United States as an awful example of the consequence of the opposite course. We find that a country in which the legal profession is predominant, in excess of all precedent, is at the same time a prey to lawlessness, which is without a parallel in any other civilized country. Nor is the explanation difficult to find. By deliberately keeping all legal standards in a state of uncertainty in order to promote litigation, Legalism renders the chances of escaping punishment so attractive that it provides a powerful incentive to transgression. Legalism is the most potent promoter of lawlessness.

This extract is from the *Daily Mail* of August 31, 1910:—"At Colorado Springs Mr. Roosevelt said: "When I was made Commissioner of Police I was ushered into office with great acclaim. I said, "'I am going to enforce the law.'" New York smiled and said, "'Go ahead.'" After ninety days New York woke up to the fact that it was being treated on a basis of morality it had never hoped

to attain. New York never realised that it could be as it was. New York was in a ferment until the Judges came to the rescue of the people. They decided that seventeen beers and one "pretzel" made a meal, and New York breathed freely again. Ever since that time New York has felt a lively interest in me and cherished a lively desire to see me elected to any office that would take me away from there."

The 'pretzel' to which Mr. Roosevelt alludes is a tiny piece of twisted and hard-baked dough sprinkled with salt, which New York publicans and hotel proprietors serve with every alcoholic drink on Sundays, in order to comply with the liquor Law which declares that drink can only be served along with food.

We read in the daily Press : 'Some of the incidents at the Schenk trial strike the English observer curiously. We read that the sheriff's men were engaged for some time yesterday in clearing the bookmakers from the precincts of the Court. Again, Mr. O'Brien's speech for the defence was so impassioned that not only the accused, but also the jurymen, burst into tears.'

In 'The Passing of the Idle Rich,' Mr. Frederick Townsend Martin says : 'The rich in America have systematically robbed the people ; they have corrupted politics, they have corrupted the Press, they have corrupted the Bench.'

In *London*, for January, 1912, in an article over the signature 'Mary Sinclair Burton' we read that : 'The domination of graft is so much a matter of course that no sane man hopes to win Justice from the Courts till he has greased the palms of Judge and counsel.

'Human life is so little consequence that the most atrocious murders excite small comment. With a population of 90 millions, murders amount to 10,000 a year, or nearly eleven times as many in proportion to her

population as England, or seven times as many as France. For this awful holocaust, only one murderer in sixty-eight is adequately punished. Either he escapes through the supineness of the police, or the power of money changes the charge from murder to manslaughter, or justifiable homicide ; while the unwritten law makes so powerful an appeal to the imaginations of a somewhat hysterical people that a miscarriage of Justice is hastened by the popular verdict.'

In 'Daughters of Ishmael,' by Reginald Wright Kaufmann (London, 1912), we read, p. 172: 'Has the Law really tried ? Has it ever attempted, for instance, to do anything to the men that take these immigrant girls at the dock and make slaves of them ?'

'Yes, it has, it has tried just that. In Chicago two men were arrested for taking a couple of such girls—they had brought them from New York—and when the case was appealed, the United States Supreme Court found that, though importation of girls was a violation of federal law, providing a punishment for merely *harbouring* such girls after their arrival was unconstitutional' . . . (p. 182). 'That sort of legal practice is a highly specialized branch of the legal profession on the lower East side. The purpose of that branch is simply the protection of the criminal, especially the criminal engaged in the procuring or confining of slave-girls ; but its methods, far from being unusual, are merely a glaring extension of the methods that, within the last decade, have increased in popularity among the seemingly more respectable practitioners. Evidence is manufactured or destroyed, according to immediate needs ; favourable witnesses are taught favourable testimony ; postponements are secured until a politically indebted Judge is on the Bench. There follows a formal bellowing against what are called invasions of inalienable personal rights, and then there comes a matter-of-course acquittal.'

In the June number, 1912, of the *Church Quarterly Review*, the Report of the Chicago Commission is to the effect that 'prostitution in the city is a highly commercialized business controlled largely by men, and producing a profit of more than \$15,000,000 a year.'

In a 'Chinese Appeal to Christendom concerning Missions' (London, 1911), p. 274, we read: 'Mr. Weir, an American writer, says that citizens of the United States are murdered at the rate of two hundred a week and that crime costs the Republic £275,000,000 per annum or £70,000 a day. . . . Ten thousand persons are murdered in this country every year—shot, strangled, poisoned, stabbed, or beaten with a club or a sand-bag. Of the murderers, two in every hundred are punished. The remaining ninety-eight escape—absolutely free! In many of our States the proportion of convictions is only half as great.'

Under the heading 'Trial of a Judge,' 'Impeachment for Bribe-taking,' the *Daily Mail* of July 9 has the following from its New York correspondent: 'The word "clum," which is the latest American substitute for "graft" or corruption, figures in the three articles of impeachment returned by the Judiciary Committee of the House of Representatives to-day against Judge Robert Archbald of the United States Commerce Court. Since the establishment of the Republic, only eight judicial or civil officials have been impeached.

'Judge Archbald, who was appointed to his present position by President Taft in January 1911, is accused of "prostituting his high office for his personal profit," and with committing high crimes and misdemeanours.'

After stating that his sense of moral responsibility had apparently become deadened, the Committee declares that Judge Archbald attempted by various transactions 'to make profitable bargains with parties having or likely to have cases tried before him.'



The thirteen articles of the impeachment allege that Judge Archbald, together with other persons, sought to obtain options on various coal properties which owned and controlled railway companies engaged in litigation before him. Judge Archbald is to be tried before the United States Senate.

The following extracts are from an article by 'Anglo-American' that appeared in the *Daily Mail* of July 19, 1912, entitled 'Graft and Crime: the Police and Public Problem in New York.' . . . 'An honest or tactless patrol-man a few years ago caught a thug assaulting a woman in the street, caught him red-handed and took him to the station-house. He was bailed by a representative of his brother-in-law, a Tammany Assembly-man, and when the case came up for trial the Magistrate dismissed it. Over and over again this same policeman arrested the same thug on all manner of charges, each time on good evidence and each time the farce was repeated. . . . It is in that sort of school that the New York policeman picks up his ideas of justice. He finds all around him an organized community of criminals and law-breakers living under the protection of his official superiors and their political and legal allies. . . . He finds politicians, lawyers, magistrates, and the higher officers of the force all working together to blackmail saloons. . . . Some particularly scandalous accident like the murder of this man Rosenthal precipitates a crisis. But all that is needed is a little patience. . . . When the storm has blown over, the politicians, the "shyster" lawyers, and the debauched magistrates and the "grafting" police remain fostering depravity and crime that they may batten on it.'

Commenting on the brutal murder of Miss Curran in a 'graft'-protected hotel within a few weeks of the assassination of the gambler Rosenthal in the open street,

the *Outlook* has the following: 'We know that there is always a percentage—not a large one, perhaps a fifth of the whole body—of the New York police who live by "graft"; they are in league with politicians, magistrates, lawyers, and law-breakers to exploit nearly every form of crime and depravity. They make a lucrative business of safeguarding malefactors against society instead of society against its enemies.'

Our readers will not fail to observe that the association of the lawyer with the law-breaker, the encouragement extended to crime, are a practical outcome of the Bar-habit, which sacrifices the gravest issues to a perverse ingenuity of interpretation. Owing to a vicious system of recruiting the Bench, the Bar-habit has long become a Bench-habit, and the crimes of the under-world of New York are merely one of its aspects. Its essential characteristic everywhere is the consecration extended by the Bench to sophistical figments raised by the Bar. The subterranean aspect of legal sophistry is chiefly a matter of national concern.

But our readers will form a very inadequate opinion of the insidious nature of the Bar-habit if they consider it only in its baser forms. These provide personal gain for men who are under no illusion. They possess the wisdom of the serpent in perceiving loopholes through which they can wriggle with safety to the attainment of their ends. But these loopholes are provided in a great majority of cases by learned, upright, and honourable men who labour under the delusion that they are administering Justice. That is the Bar-habit in its most pernicious phase when it occurs as the malady of noble minds. It is the ailment of Anglo-Saxondom. It occurs in the most exalted circles and occasionally threatens to disturb international relations. President Taft's action in the Panama Canal question is its most recent manifestation.

With much less ingenuity than is commonly displayed in theological exegesis, the parent of the Dar-habit, it might be contended that President Taft's support of the Senate in the Panama Canal legislation is a signal example of retribution, inasmuch as this country is the principal victim of a piece of State sophistry which (traced back through legal sophistry) is seen to be due to our method of recruiting the Bench ; and so we are hoist with a petard of our own invention. Mr. Taft is a lawyer, learned, upright and honourable. His is an extremely interesting case. Its study should make for our edification. It is in keeping with our sense of the fitness of things that the President of the Republic should keep the Premier of the Empire in countenance. The latter is also a lawyer, learned, upright, and honourable. We have seen his eulogy of the mischievous vagaries of the Common Law of England. That is fortunately not an international question. But as regards the strange mental obliquity which unconsciously substitutes a narrow sectional interest for the broad interest of Justice, the efforts of Premier and President to make the worse seem the better reason are illuminating. They are symptoms in exalted personages of the ailment of Anglo-Saxondom.

But these personages are less to blame than the system. This fact will be perceived clearly, and it helps us to understand the otherwise inexplicable position assumed by the President when we read in the *Morning Post* of August 13, 1912, what Mr. Maurice Low, a recognized authority on American questions, has to say on the subject. 'The Supreme Court,' he assures us, 'has repeatedly ruled, and the question is now *res adjudicata* that a treaty does not outrank a law ; and when a treaty has been annulled by subsequent legislation, it will be held that Congress acted deliberately and with knowledge, and the same rule will be applied when provisions in two laws conflict, that is, that the last enactment has repealed all others

inconsistent therewith, even although the repeal has not been specifically stated.'

If our readers will supply the corollaries to that astounding statement they will readily visualize a long vista of complications, references to The Hague, refusals to refer to The Hague, alarums and excursions, one and all tending to the glorification of the parasitical caste and the gradual disintegration of the host. That is the menace of Anglo-Saxondom.

It cannot fail to be a subject of keen regret to those who ardently desire a continuance of friendly relations between the British Empire and the United States, when they perceive that the Panama Canal question is by no means the only one with potentialities of undesirable friction that is outstanding. The Fur Seal Treaty is another instance of the Senate's assuming an attitude which meets with the strong disapproval of the leading authorities on the subject, including some of the most distinguished of its own members.

It is unnecessary to set forth the various phases of the fur seal negotiations between the United States, Canada, Russia, and Japan. They will be found at great length in an important article in the *Morning Post's* issue of September 4, 1912. Suffice it to mention that on February 7, 1911, a treaty was signed at Washington; Great Britain and the United States agreeing to prohibit pelagic sealing which threatened to exterminate the herd, the United States compensating Great Britain by paying £40,000 and one-fifth of the value of the skins annually taken.

That was a beginning of negotiations. As a result, Russia and Japan were induced to enter into an agreement. The treaty just mentioned was superseded, and the present treaty, that of July 7, 1912, was signed by the representatives of Great Britain, the United States, Russia, and Japan. The treaty provides for the final

prohibition of pelagic sealing; 15 per cent. of the seals taken annually on the Pribiloff Islands are to be delivered to an agent of the Canadian Government and a similar number to an agent of the Japanese Government. Russia enters into a like compact regarding the seals on another group of islands within her jurisdiction, this being a consideration, precisely as in the case of the United States, paid to Canada and Japan in lieu of their undoubted right to pelagic sealing.

But there is a further clause in the treaty as between the United States of the one part, and Canada and Japan of the other. The United States is given the power of suspending the taking of seals on the Pribiloff Islands if it is deemed necessary to protect and preserve the herd: during the suspension a payment of £2000 a year is to be made to Britain and Japan.

There was a consensus of opinion among experts that with the abolition of pelagic sealing all danger to the herd had ceased. But an agitation began for the introduction of a close season when the Bill was presented to Congress. It was argued that policy dictated a payment of £2000 a year during a close season extending over several years, so that the herd might increase and multiply for the advantage of America when the treaty period had expired. Experts, however, were opposed to the close season; they considered it detrimental to the herd, because the preponderance of old bulls prevented the younger ones from coming in contact with the cows. That was the argument from natural history. Nevertheless, the House established a close season for a year. Whereupon the Senate extended the close season to ten years or two-thirds of the treaty period. This action was naturally resented in Canada and Japan. Its impropriety was pointed out by Senator Root in the following speech:—

‘It is now proposed for two-thirds of the time that we should take away from Canada and Japan all the profits except \$10,000 a year. in order that after the expiration

of the treaty we may have a great herd for our own benefit. They relied entirely upon our good faith. They relied upon our sense of honourable obligation not to stop the killing that was to give the consideration for their contract, not to stop unless it was necessary, the killing which we held up to them as of more value than pelagic sealing. Every sense of honourable obligation, every sense of self-respect, requires that we shall not stop the killing—cut off this profit from these co-partners of ours, who trusted in our honour and good faith, unless we are ready to prove by a demonstration that it was necessary. We cannot prove it, for every officer of the United States who has ever had anything to do with this business is on record to the effect that it was not necessary.'

Prominent among the officers mentioned by Senator Root are the Secretary of Commerce and Labour—in whose Department the control of the Pribiloff Islands is placed—and the Commissioner of the Bureau of Fisheries. Ignoring their testimony, the Senate decreed a close season for ten years ; but as the result of the compromise between the House and the Senate, the close season has been reduced to five years.

We venture to ask our readers whether they are content to consider it a mere coincidence that the country which is pre-eminently governed by lawyers should enjoy the unenviable distinction of regarding treaties as chiefly useful as providing subterfuges for the evasion of obligations ? Is it a mere coincidence that a country in which lawlessness is rampant should be at the same time in a fair way to achieve a record in playing fast-and-loose in its external relations ?

Rightly considered, are not those phenomena simply different aspects of a shifty and rapacious commercialism which receives its warrant and justification from a hair-splitting and unscrupulous Legalism ?

In its action downwards, this ill-omened association gives a powerful impetus to crime by securing a large

measure of immunity from punishment, while its enthrone-ment in the highest political spheres fills the friends of the United States with apprehension. Confidence in the growing stability of international relations, trust in the final success of arbitration, are proved to be broken reeds if we are reluctantly compelled to admit that a square deal with the Government of the United States is no longer possible.

## APPENDIX H

The *Times* correspondent, writing from Lucknow on December 16, 1909, has the following : ' A great outcry has been made by the Hindus because it is found difficult to get the pleader and the barrister, who furnish the bulk of the professional agitator class, on to the new Councils. As a matter of fact, it is the fault of these gentlemen themselves if they are not eligible for election, in that they have failed to qualify for public service in a larger sphere by having neglected the opportunity of serving in a smaller, but none the less responsible, manner on either District or Municipal Boards. The regulations have merely discriminated in favour of those who have already done good work for their country, and it can hardly be claimed for the lawyer that he represents the masses, or, indeed, that he is their friend, for it is he, above all others, who too often encourages needless litigation, which is one of the curses of this country.'

In reporting the Deccan murder by telegraph on December 26, 1909, the Bombay correspondent of *The Times* says : ' It is thought that the Government should plant a heavy punitive police on the community and that, above all, none of the guilty should escape on legal technicalities.'

Can we doubt that conditions of such uncertainty in the incidence of punishment act rather as an encouragement than a terror to evil-doers? Long centuries of Legalism have accustomed us to this demoralizing influence. We have come to consider it as inevitable, as inseparable from Law. Whereas it is the simple truth that Law, the vesture of Justice, repudiates all connection with the proceedings of the usurper Legalism before whose shrine our legal caste burns the incense of extravagant eulogy.

*The Times* Law Report of December 24, 1909, has the following judgment of the Judicial Committee of the Privy Council :—

‘ Sir Arthur Wilson said the question at issue was one purely of fact, whether Brij Lal, the deceased husband of Musamat Dhan Kunwar, now also deceased, adopted the respondent Chiranji Lal. The property in dispute was not inconsiderable. The plaintiff, Chiranji Lal, was never produced as a witness to sustain his own case and so help to discharge the burden of proof that rested upon him. It was suggested that the presumption which would be drawn in this country to the detriment of a plaintiff, who in similar circumstances failed to enter the witness-box, could not be drawn in cases between natives in India, because of a species of advocacy tolerated by the Courts of Law in that country in which the unworthy effort of the advocate on each side was to force his opponent to produce his own client, in order that he himself might have the opportunity of cross-examining that client. The result was that, should the opponent refuse to be led into the trap, the parties (the principal witnesses who possibly could throw light on all those tangled transactions which so perplexed those who had to deal with such cases) never were examined at all, and the litigation went forward through tortuous windings to its unsatisfactory and uncertain end. This case was a good example of



that practice, for not only was the plaintiff not examined on his own behalf, but the defendant was not examined on her own behalf either. It was a vicious practice unworthy of a high-toned or reputable system of advocacy. It must embarrass and perplex judicial investigation, and, it was to be feared, too often enabled fraud, falsehood, or chicanery to baffle Justice. After reciting the facts in some detail, he said the conduct of the trial was, on the whole, eminently unsatisfactory. The subordinate Judge decided as a fact, on the evidence before him, that the plaintiff had not been adopted. The High Court decided on the same evidence that he had been adopted. Their Lordships did not accept either of these conclusions. It appeared to them that the sounder view lay between these two extremes. The burden of proving that the alleged adoption took place twenty years before the trial rested upon the plaintiff. They were clearly of opinion that he had failed to discharge it. Their Lordships would therefore humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside with costs, and the decree of the subordinate Judge dismissing the action restored. The respondent would pay the costs of the appeal.'

M. Chetty says: 'The independence and integrity of the barrister-Judges have never been disputed, though they are sometimes justly reproached with ignorance of the opinions and character of the peoples of India. Their want of knowledge is, however, tempered by the fact that they have experienced civilians and natives of India as colleagues.'

This is the place to point out that in view of the necessity for shepherding the barrister-Judges it is time that the disabilities of the civilian-Judges were removed, and that all appointments open to the barrister-Judge should also be open to the man who has to watch over him.

Our author takes leave of the subject of Justice in a weighty passage :

‘When the British conquered the Punjab in 1849, that great statesman Lord Dalhousie placed the new Province under the administration of a board of three high officials, including John and Henry Lawrence, whom he charged among other things with the organization of Justice. The general instructions which he gave them are noteworthy. “You have,” he said in substance, “to deal with a primitive and simple population which does not understand the complications of procedure. Give them a system of Justice which will satisfy common sense. Avoid technical terms, circumlocutions, and obscurities. Simplify and abridge law and procedure, and endeavour to check litigation. Constitute tribunals which shall not be steeped in formulas intelligible only to lawyers, and let them be easily accessible. Let every litigant claim his rights and plead his cause in the presence of his adversary.”’

‘The two Lawrences, who were respectively endowed in a very high degree with sympathy and good sense, did, in effect, constitute in the Punjab a system which was perfectly adapted to the local circumstances. The rules regarding evidence and proof were simple and liberal ; a large place was given to arbitration ; and steps were taken to obtain the knowledge of local customs. The procedure prescribed had no claim to theoretical correctness, but it brought parties and their witnesses together, and a decision promptly followed. The natives found that they had always to deal with the same man, for their collector was at the same time the District Judge. Nothing suited them better.

‘Later on, however, under the influence of a desire for uniformity and with the idea of giving greater guarantees to the public, the Province was subjected to the rules of the Civil Procedure Code.

‘A Chief Court was created in imitation of the High

Court of the older Provinces, and, under its influence, formalism rapidly developed. Judgments were set aside for technicalities. Preference was given in evidence to registered documents, the character of which was not understood by the people.

‘ A standard of proof was required to which the population was not accustomed, and cases were decided by strict law and no longer by equity. Formerly, for instance, when land had been pledged for debt under onerous conditions, it was presumed that the borrower had been prejudiced by ignorance or moral pressure, and the law was softened in his favour. But the Indian Contract Act of 1870 required adherence to the letter of contracts, and the Chief Court’s judgments made this method rigid.

‘ The legal revolution thus accomplished in the Punjab had been carried out earlier in the older Provinces ; and the High and Chief Courts have stereotyped a jurisprudence which rests on the strict and literal interpretation of the law. In the older Provinces this evil is irremediable. Legality and formalism have triumphed, and the people are resigned. But in the new Province along the frontiers where a native policy ought to conciliate the indigenous tribes by an understanding of their customs and indulgence to their desires, it is perhaps not too late to return to the old simplicity. One is struck by the fact that in India a condemnation passed by a British tribunal is not held by native opinion to involve moral degradation.’

Thus he who runs may read that the interests of the natives of India and, indirectly, the credit of the dominant race are being sacrificed to the prejudices, subtleties, technicalities and formalities—collectively called Legalism—which constitute the stock-in-trade of the legal caste. Our Law is indeed proving a terrible Old-Man-of-the-Sea for India.

One point is specially noteworthy in this connection. Our lawyers like to convey the impression that the

transition from primitive Justice, under Dalhousie and the Lawrences, to the existing formalism is the penalty of civilization, an unfailing and inevitable tendency like the order of nature.

That is absolutely false, as a glance across the North Sea will prove. The Courts are as accessible to the people; Court fees are as low in Germany to-day as they were in India under the Lawrences. Judgments are rendered as promptly, as simply, and as cheaply as Lord Dalhousie could have wished.

The inevitability of Legalism only obtains when the legal caste enjoys an uncontrolled ascendancy as it does in Anglo-Saxondom—that region where more incense is offered to the name of Justice, and where her precepts are more habitually disregarded, than in any other part of the world.

We hope and trust that neither in India, England, nor the United States is the present condition of things irremediable. We would fain believe that sincere lovers of fair play will not always be deceived by the facile phrases of special pleading which uses the figure of Justice as a mask, her uniform as a disguise, her service as a pretence for pursuing aims which are fatal to national efficiency.

Referring to a passage quoted in this Appendix from M. Chailley's work, Sir J. D. Rees, K.C.I.E., a distinguished Indian administrator, writes to *The Times* under date August 5, 1910, as follows: 'This is the truth, the whole truth and nothing but the truth. Barristers who have not been appointed Judges by the Government often appoint themselves judges of the Government; and barristers, who as a rule have not been successful in their profession in the United Kingdom, are appointed to the High Court bench in India over the heads of men who had superior intellectual qualifications in their youth and have since acquired experience of the country. Such men are, in fact, stumbling-blocks and rocks of

offence in the administration of Justice in India, and the executive Government would indeed be unworthy of public confidence if it accepted without careful investigation every facile charge and easy *obiter dictum* made by Judges, often unacquainted with the country and the people, who have not seen and not heard the witnesses, but who know all things better than those who did by the mere perusal of the written record.'

The following extract is from an article in *Blackwood* for August, 1910, entitled 'The Silent India.' Writing of the native students, the author says :—

'The Law has always had a great attraction for them, and the profession is largely overstocked—indeed the low-class lawyer and advocate are far too much in evidence. He is clever but too often disloyal, and most unfortunately monopolizes an altogether undue proportion of seats on Municipal and District Councils. It is difficult for the simple man to understand the procedure of the Courts—some legal agency is necessary. And in a country where perjured witnesses are numerous and cheap, going to law is very much what an American author describes poker, "a beautiful but uncertain game" which appears to have a peculiar fascination for the Oriental. In former times much of what is now fought out in the Courts was satisfactorily and gratuitously adjusted by the village tribunals, and the decadence of these is much to be regretted.'

In *The Imperial and Asiatic Quarterly* for October 1910, in an article by Mr. James Kennedy, I.C.S., on 'English Education and Indian Ethics,' we read :—

'The French in Algeria exclude French-speaking Arabs from the Bar and practically confine them to a single profession—that of medicine.'

Such drastic measures are neither desirable nor possible in India. But if French statesmen have overestimated

a danger, ours have incautiously ignored it. Observe, too, that with our Bench—composed as to two-thirds of barrister-Judges—the danger of the judiciary being constantly led astray by the extraordinary astuteness and dialectical subtlety of the Oriental mind presents probabilities in India that are excluded under the French Republic, where there are no barrister-Judges. One and all receive a special training for the exercise of judicial functions. Subtleties are the besetting sin of the Bar.

In a case reported in the *Calcutta Englishman* of February 2, 1911, there is an instance of the ‘howlers’ for which the barrister-Bench is establishing an unenviable reputation. It was an appeal against a judgment of Mr. Justice Harrington in a divorce case.

‘Counsel read two letters received by the petitioner from the respondent . . . he then read the judgment, concluding with the words “in my view there are not sufficient grounds to establish a charge of adultery.”’

‘Counsel submitted that the learned Judge had wholly failed to consider or give effect to the admissions made by the respondent in his letter to the petitioner.’

‘Mr. Justice Woodroffe read the two letters from the respondent and said their lordships considered that the charge of misconduct was proved. The previous judgment was therefore reversed.’

The *Calcutta Englishman* of February 23, 1911, reports a case tried before Mr. Justice Fletcher, when the following incident occurred:—

‘Mr. Bose : “I submit I am entitled to get the name. Will you give me the names of your informers ?”’

‘Witness : “They are private informers.”’

‘Mr. Bose : “I do not care.”’

‘Witness : “I decline to give the names.”’

‘ Mr. Justice Fletcher : “ You must. If you do not like to state them you may write them down.”

‘ Witness : “ Unless I get permission from my superiors I cannot give the names.”

‘ Mr. Norton referred to Section 129 of the Evidence Act and said the communication was privileged.’

Here is a barrister-Judge who is so little familiar with the Evidence Act that he is unaware of one of its most important provisions which is intended for the protection of people who give information to the police.

In its issue of June 19, 1911, *The Times* calls attention to a grave condition of things in the High Court of Calcutta. After mentioning various failures of Justice, the article continues :—

‘ A few days earlier thirty-three persons who were charged in the same Court in what is known as the Howrah conspiracy were acquitted. The charge was of the gravest kind, for it was alleged that the accused had collected arms, men and money for the purpose of overthrowing the Government. In the same month seventeen men engaged in the Khulna dacoity case, charged with organized robberies with the object of collecting funds for revolutionary purposes, were released without punishment. The procedure in this case was astonishing. It was publicly stated that a compact was made between the Government, the Special Tribunal, and counsel for the accused. The men pleaded guilty on condition that they got off scot-free. A most serious form of crime was condoned to suit the ends of a misguided policy. What are the reasons of the muddle which these successive incidents reveal ? The first is the unquestionable weakness and insufficiency of the Bengal High Court. The administration of Justice in Calcutta has almost reached a deadlock.’

There is not the slightest mystery about this phenomenon. Nemesis is overtaking us. We are reaping the whirlwind. The Bench is too weak for the Bar. And

so it comes about that there is an end of Justice. Having long treated it as a commodity, we now degrade its spurious imitations still further and make them the subject of a bargain with criminals, traitors and rebels. Kindred causes are producing similar results in this Empire and the United States. President Taft deplors the fact that 'most of the criminals in the United States escape punishment.'

In the summary for the year 1911, the leading journal, in its issue of December 30, makes the following reference to those abuses in Calcutta :—

'Though the manner in which several conspiracy trials pending in Calcutta were brought to a close was certainly open to criticism, the action of Government is now generally recognized to have been, at any rate, a lesser evil than the public scandal of such interminably prolonged and ineffective proceedings as those in the Howrah case.'

It is undeniable that if the present vicious system is to be perpetuated such trafficking with rebellion is inevitable. The Bar goes from triumph to triumph. Its astuteness is now equalled by its arrogance. The barrister-Bench is hoist with its own besetting sin, the reverence for sophistry. We are watching the effect of one of the most powerful solvents of Empire. Meanwhile panegyrics on English Justice are heard at every banquet and no one heeds the writing on the wall. Those who should lead the people are causing them to err.

In *The Times* of July 9, 1912, there is a letter from the Calcutta correspondent of the journal dated June 20. Discussing the desirability of the establishment of a High Court at Patna, we read : 'It is recognized as fitting that the New Province should have a High Court of its own.' Then comes this significant passage : 'The main objection urged is that such a Court would not be so free from civilian control or influence as the Calcutta High



Court, since Judges in a mofussil town will necessarily associate daily with the local officials. But as the proposed Court will consist of seven Judges, it will be at least as independent as any High Court or Chief Court outside Bengal.'

Our readers are aware of the condition to which sheer Legalism—that is, independence of civilian control—has brought the High Court of Calcutta. That condition amounts to a denial of Justice. No matter ; it is an ideal condition from the point of view of vested interest, as the passage cited clearly proves. Professionalism makes no attempt to conceal its special point of view. It deprecates close association with the civilian element lest the habit of interpreting the obvious and natural meaning of words should prove contagious and find its way into rulings and judgments to the disadvantage of the Bar. Such a result would be all to the advantage of the honest litigant ; but he is the last person to be considered.

Observe the emergence of two characteristics : the first is the unconscious cynicism of substituting the interest of the parasite for that of the host ; the second is the strong resemblance between Sacerdotalism and Legalism. The former has ever discouraged a community of interest or a close association of members of the priestly caste with the laity for precisely the same reason which appeals to our Legalists of the twentieth century. In the most vital domain Legalism is seen to be an insidious enemy of the public welfare. From its influence the State must be emancipated if it is to have a worthy survival.

In Sir Edmund Cox's work entitled ' Police and Crime in India,' the author, citing Sir James Fitzjames Stephen (p. 77), says : ' The Indian Penal Code is to the English Criminal Law what a manufactured article ready for use is to the materials out of which it is made '

In the same book (p. 173) we read : ' Our law as it stands is so much more designed for the protection of the innocent than for bringing home their guilt to the guilty, and so many undoubted criminals are daily acquitted.' Compare the testimony of another observer, the Rev. Mr. Holmes. He is in complete agreement with Sir Edmund Cox.

On the attitude of barrister-Judges in India to the police we read (p. 327) : ' Native Police Officers have often complained to me that the attitude of suspicion towards them by European Judges and native Magistrates drove men into corruption. They said " condemnations are slung at us in judgments, our characters are blasted, our reputations ruined on one-sided statements without the possibility of reply. Is it fair ? Is this kind of treatment likely to enhance our self-respect ? " '

It is part of the price which we pay for our devotion to the cult of advocacy that the licence of the Bar is constantly abused in the direction complained of by Police Officers. The Legalist maxim at home, ' No case : abuse the plaintiff's attorney,' is modified in India into ' No case : abuse the police.' A notorious instance of this licence of the bar being grossly abused was the defence of the late Guicowar of Baroda in Baroda by Serjeant Ballantine. He scouted the suggestion that the Prince was aware of the attempt to poison Brigadier-General Phayre, the Resident. It was, on the contrary, a nefarious attempt engineered by the police to ruin the much-injured Guicowar. The police were mentioned one by one as they had appeared to give evidence, and after roundly denouncing them as assassins, perjurers and villains of the deepest dye, the learned Serjeant continued : ' And now we come to a comparatively respectable witness, Sir Frank Soutar.' The gentleman referred to in the Old Bailey manner was the head of the Police in the Bombay Presidency. He was a man who had rendered important service to the State and had

earned the respect of the entire community European and native.

The following communication from its Calcutta correspondent appeared in *The Times* of July 23, 1912: 'The hearing of the appeal in the Midnapur case, which came to an end yesterday, lasted forty-eight days. Mr. Garth, in opening the case for Mr. Weston, spoke for twenty days. Mr. Dunne, who dealt with the legal issues involved, occupied two days; and Mr. Norton, who represented the two police officers, took four days. Mr. K. B. Dutt, counsel for the plaintiff, spoke for seventeen days, and his junior, Mr. Bose, for four. When it is remembered that the original suit was before Mr. Justice Fletcher for 192 days, and that the evidence taken made up eleven volumes of about 1000 pages each, the High Court is perhaps to be congratulated on the brevity of the proceedings on appeal.

The three Judges, Mr. Justice Woodroffe (barrister), Mr. Justice Coxe (civilian), and Mr. Justice Chatterjee (vakil), indicated clearly from time to time that much irrelevant evidence had been introduced in the Court below, and upheld counsel for the appellants in dismissing various issues as having no bearing on the case.'

The Midnapur and Mymensingh cases have a strong resemblance. Both turn on the action of Magistrates under conditions of great difficulty. In both cases grave political unrest existed. In neither was the personal honour of the Magistrate impugned. In both instances the Magistrates were charged with errors of judgment. These Magistrates are civilians. The Mymensingh Magistrate, Mr. Clarke, was cast in damages, and according to a leading article in *The Times* of July 23, 1912, the finding was due 'to a wrong interpretation of enactments, the real meaning of which ought to have been simple and obvious even to the Calcutta High Court.' Five years elapsed before Justice was done in this case by the Judicial Committee of the Privy Council. 'This is no

new question,' says *The Times* in its issue just cited; 'it has been a secret ulcer in the Indian Administration for more than a century.'

After Mymensingh, Midnapur. In the latter case Mr. Weston was fined £82 for what the Judge in First Instance was pleased to consider an error of judgment. He ordered a search in the house of a certain Peary Mohan Das, where a bomb was found. On Das's behalf it was urged that the bomb was placed there as part of a police conspiracy to ruin him. It was not suggested for a moment that Mr. Weston had any knowledge of the alleged plot. He was said to have been misled by it. But is it not obvious that Legalism in this acute form will make the maintenance of order impossible when we consider the enormous expense of these preposterous trials? Mr. Weston is said to have incurred an expenditure of £26,000 in his defence. Whatever figures the cost reached in first instance, the appeal must have added a heavy sum.

In his essay on Warren Hastings, Macaulay has this passage: 'There are few Englishmen who will not admit that the English law, in spite of modern improvements, is neither so cheap nor so speedy as might be desired. Still, it is a system that has grown up with us. In some points it has been fashioned to suit our feelings; in others it has gradually fashioned our feelings to suit itself. Even to its worst evils we are accustomed; and, therefore, if we do complain of them, they do not strike us with the horror and dismay which would be produced by a new grievance of smaller severity. In India the case is widely different. English law, transplanted to that country, has all the vices from which we suffer here; it has them all in a far higher degree; and it has other vices, compared with which the worst vices from which we suffer are trifles. Dilatory here, it is far more dilatory in a land where the help of an interpreter is needed by every judge and every

advocate. Costly here, it is far more costly in a land into which the legal practitioners must be imported from an immense distance. Accordingly the fees of Calcutta are about three times as great as the fees of Westminster Hall; and this though the people of India are, beyond all comparison, poorer than the people of England.'

In commenting on the notorious Mymensingh case the *Morning Post* of July 29, 1912, has the following: 'The facts of the case were briefly as follows: In April 1907, when Mr. L. O. Clarke was District Magistrate of Mymensingh (Bengal), tension arose out of the boycott of British goods forced on the Mohammedans by the Hindu Zemindars. Mr. Clarke ordered a search of some kutcheries at Jamalpur, where he believed arms to be concealed. The search having brought to light nothing of an incriminating nature, Mr. Clarke was sued for unlawful trespass, and cast in damages on June 19, 1908, by the Calcutta High Court. This decision was upheld by the High Court on appeal (January 12, 1909). Mr. Clarke then appealed to the Privy Council (although leave to appeal had first been refused by the Calcutta High Court), and after five years the judgment was reversed. The Privy Council found that Mr. Clarke's action was warranted by the Code of Criminal Procedure. . . . The case is of the highest importance in view of the need for strong executive action in India, and District Officers will probably have experienced a feeling of relief as the outcome of the appeal to the Privy Council.'

After Mymensingh, Midnapur. On Saturday, August 17, 1912, Mr. Justice Woodroffe completed the reading of the judgment begun on the 15th in the Midnapur case. This was an appeal case arising out of a claim for damages against Mr. Weston and two police officers by the accused in the Midnapur conspiracy case. The Court completely exonerated Mr. Weston and the

police officers and dismissed the suit for damages with costs, which are said to amount to at least £20,000. Mr. Justice Coxe and Mr. Justice Chatterjee concurred.

*The Times* has the following comment on this case in its issue of August 20, 1912: 'The judgment in the Midnapur appeal case is the subject of general comment in the Indian Press. The *Englishman* declares that the public faith in the original side of the High Court has been profoundly shaken, and it trusts that steps will be taken to strengthen the Court in a direction so obvious that it need not be specified. The journal further hopes that Mr. Justice Fletcher himself will assist to that end. The *Statesman* declares that Mr. Justice Woodroffe demonstrated the baselessness of the charges against Mr. Weston and the want of common fairness with which they had been invented and pressed. The *Pioneer of Allahabad* thinks that the public may be excused for asking themselves whether Mr. Justice Fletcher can continue very much longer to hold his present position with advantage to himself or to the public service. The *Amritsar Bazar Patrika*, however, declares that the people are profoundly dissatisfied with Mr. Justice Woodroffe's judgment, and are simply astounded at the way in which Mr. Justice Fletcher and Mr. Dutt have been treated. The *Indian Daily News* cannot understand why first judgments are so often reversed on appeal. The *Bengalee* gives it to be understood that it will have a good deal to say on the subject, but prefers not to say it yet.'

Mr. Weston is the Magistrate of Midnapur. Mr. Justice Fletcher heard the case in first instance. He is a barrister-Judge. After a hearing extending nearly a year he awarded the plaintiffs Rs.1000 (£66) damages but exonerated Mr. Weston from all charges involving bad faith. The hearing of the appeal lasted forty-eight days. The *Patrika's* pretension to speak for the people of India is on a par with that legend of the three tailors of

Tooley Street who met in solemn conclave and passed a resolution beginning "We the people of England." The *Patrika's* people are the legal caste to whom subterfuges, whimsicalities, technicalities, and intolerable prolongation of trials are the breath of life.

The following extracts are from a leading article in *The Times* issue of August 22, 1912:—

'It is important at this stage to note the records of the three defendants. Mr. Weston has been seventeen years in the Indian Civil Service and his career is said to have been "more than ordinarily distinguished." Mazar-ul-Haq has thirty-three years' meritorious service in the police force, and no charge was ever brought against him before. Inspector Lal Mohun Ghose has completed eighteen years' service and his record is equally good. The only salient fact disclosed concerning the plaintiff is that he was dismissed from Government service for conniving at forgery, after which he appears to have followed the undistinguished pursuit of money-lending. . . . The hearing in first instance lasted eleven months and the Court actually sat on 192 days. Mr. Weston had to be summoned from England to attend. The recorded evidence extended to eleven volumes of 1000 pages each. In the course of the trial Mr. K. B. Dutt, counsel for Peary, was allowed to bring gratuitous charges of gross misconduct against a large number of prominent officials. The charge of committing "a clumsy piece of forgery" levelled against an Inspector-General of Police, and the allegation that a British Officer who was in control of the Midnapur gaol had permitted perjury are merely specimens of these broadcast accusations. Even Mr. D. J. Macpherson, the distinguished Commissioner who inquired into the Midnapur affair, did not escape Mr. Dutt's censure, for he was alleged to have intimidated witnesses and to have committed other offences. Mr. Dutt did not substantiate these charges; but they were passed over in silence by Mr. Justice Fletcher when he delivered judgment. . . .

Mr. Justice Woodroffe and the other appellate Judges were rightly severe in their strictures upon the scandals which attended the original hearing of the suit. They said that much irrelevance was admitted, that the issues in the case were constantly shifted and that extraneous charges were made unsupported by evidence. Their strongest condemnation of Mr. Justice Fletcher is that he delivered findings that have no place in the suit. . . . Mr. Dutt is also severely censured for his reckless accusations, and for his refusal to give evidence in support of them. This is another illustration of the gross latitude allowed to counsel, and especially to Indian counsel, in the Indian Courts.'

Our readers will hardly be prepared for the remedy which the leading journal thinks efficacious for this ailment. It is nothing more drastic than 'a rigid investigation at the hands of some eminent judicial authority appointed from England.'

This is the kind of tinkering which we have borne with for centuries past when our neighbours and rivals, happily free from the ascendancy of the legal caste, have introduced the most far-reaching and beneficent reforms. The fountain and origin of this grievous evil is found in the English judicial system which is being exploited for our undoing by men who draw their inspiration and justification from a pronouncement of a Lord Chancellor of England. See the heading to Chapter II.

The *Saturday Review* for August 24, 1912, has the following comment on the Midnapur case: 'It appears from the account of the proceedings in the Midnapur case that the Indian Government will have to take measures to prevent the Courts being used for the oppression of its officers under the forms of law. . . . Mr. Justice Fletcher,<sup>1</sup> of the High Court, Calcutta, played into the agitators' hands probably through weakness.'

<sup>1</sup> See footnote to page 94 of the text.



## APPENDIX I

In its issue of January 18, 1900, *Truth* quotes a letter from a solicitor to the following effect: ' . . . The first case referred to is that of the Mokau estate. The other is still more significant. If it be true that a client complained to the Law Society that a solicitor had endorsed his name upon a cheque without his authority ; and, if the indorsement being upon the cheque and the client making this allegation in respect of it, the Committee decided that there was not even a *prima facie* case for investigation, this one case alone would be sufficient to stamp the Discipline Committee as unfit to be longer trusted with the discharge of its functions. In the face of such a spectacle as last Monday's when nine solicitors were judicially executed in one batch—seven of them for breaches of trust or fraud on professional clients—and in the face of similar evidence that is continually coming to light, the present is certainly no time for relaxing whatever protection the public is afforded by the present system of dealing with offences of this class.'

Another celebrated case in recent years is the Stoddart case. The indictment preferred against Mr. Stoddart and his son-in-law Mr. Catling consisted of eleven counts ; the first four charged them with conspiracy to defraud the public, the last seven for obtaining money by false pretences. The business for which Mr. Stoddart was responsible was carried on in London and Middelburg, Holland. He owned a publication called the *Football Record*, wherein it was announced that the sum of £400 was divided weekly amongst competitors who succeeded in guessing the correct results in certain games of football. The amount paid in prizes between October 1907 and September 1908 was upwards of £22,000. During that period the names of thirteen bogus winners were

published. The amount which should have been paid to them had they been genuine was £1500.

The frauds were carried on by certain persons filling up a coupon at Middelburg after the result was known, with a false name and address, and returning the bogus name to Mr. Stoddart in London as a genuine winner. Letters were then addressed to the winners, genuine and bogus, and the prizes put into envelopes for them. The letters to bogus winners were either intercepted or arrangements were made to obtain possession of them at the addresses given.

All the money for distribution among the winners was provided by Mr. Stoddart, who strenuously denied that he had any knowledge that some of the names were bogus. He had, as a matter of fact, parted with the whole amount except a sum of £300 alleged to have been won by a certain d'Abyet, for whom the money was still held.

This brief outline suffices to indicate that the suspicion of fraud and conspiracy extended to the chiefs and employés of two offices, while the chances of detection were reduced by the practice of drawing cheques to 'self' and sending cash or notes to the winners.

The case was further complicated by the allegation of a plot within a plot. Mr. Stoddart asserted that he, instead of being the chief depredator, was the principal victim and had been ambushed and despoiled of considerable sums.

The dead hand of custom handed over this case to the arbitrament of a Judge and Jury. The juryman has all our sympathy. He sees before him a divided duty—the call of citizenship and the claims of business. Not wishing to be unresponsive to the former, he cannot long neglect those of the latter. The trial lasted twenty-three days. The jury disagreed about Mr. Catling's share in the alleged conspiracy. Mr. Stoddart was convicted on February 25, on six counts, four for conspiracy, two for

obtaining money by false pretences, and sentenced to eighteen months' hard labour on each count, the sentences to run concurrently. Moreover, he was ordered to pay the taxed costs of the prosecution, under the recent statute, amounting to upwards of £2000. This sounds very serious indeed, but the comedy is by no means played out. The curtain has only been rung down on the first act.

The appeal was first heard on Friday, April 23, and Saturday 24, 1909, before three Judges. But counsel having taken the point that the learned Recorder had misdirected the jury, it was ordered that the case should be placed in the paper for hearing before a fuller Court of five Judges. That was the second act.

The case was accordingly heard on May 7, 8, 14, and 21, when the Court reserved its judgment. It was not until the 28th that the Lord Chief Justice read the judgment, which occupies exactly three columns of *The Times* small type.

On a careful study of this portentous judgment we become aware of the fact that the difficulties originally inherent in the case are as nothing compared with those which Legalism itself introduced during the trials. These form a veritable tangle of fine points, many of them visible only to the microscopic eye of the sophist. Misdirection on the part of the learned Recorder was alleged in no fewer than thirty-six instances. It was urged that he had been unfair throughout; that the increase of bail had been irregular; that the Recorder's observations as to Mr. Stoddart's secretary had been improper—for the feature which an Italian Judge declared to be present in every important case was not wanting, *c'è sempre la donna*. Sure enough there was a lady in the case. Nine-tenths of these objections were waved aside by the Court of Criminal Appeal; but on one point it was held that there had been a substantial miscarriage of Justice. The learned Recorder said in summing up:—

‘The moment the prosecution had established the fact that not a farthing had been paid to some of the persons who are alleged to have received the sum of £60, the burden of proof was thrown upon Stoddart, he being charged with fraud in that connection, to show that, in fact, he had paid it. You follow me : the burden of proof is upon him. Under ordinary circumstances the burden of proof is upon the Crown. They allege that a man has been guilty of fraud, and they have to prove it ; but when, as in this case, you find that Stoddart is sending out to the world that people have won £60, and when upon investigation it is found that the money has not been paid, then the burden of proof is upon him.’

That was the essential portion of the summing up in the view of the Court of Criminal Appeal ; and the following reference to it appears in the judgment :—

‘The passages which have been cited at length are the only ones in the summing up which bear directly on the onus of proof. . . . In the opinion of the Court, the jury may have thought that if Stoddart had not proved he had supplied money in every case, they must convict him ; whereas the direction ought to have been that they must be satisfied, after all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and if in doubt, they ought to acquit him. It is in failing to explain this that the Court is of opinion that there was a substantial misdirection. . . . Notwithstanding the view which we have expressed, we have had seriously to consider whether we ought not to dismiss the appeal under the proviso of subsection 1 of Section 4 of the Criminal Appeal Act of 1907, on the ground that no substantial miscarriage of Justice has actually occurred. This, in our opinion, raises a question of great difficulty. The explanation given by Stoddart as to many of the cases was most unsatisfactory. There was, in the opinion of the Court, strong evidence against him to support the view taken by

the jury ; but we cannot say that the facts established were inconsistent with his innocence. . . . The judgment of the Court must be that the appeal must be allowed and the conviction quashed.'

Considering the expenditure of time and money on this case, it may well be doubted whether the jury system is not dear at the price, even supposing it deserves all the encomiums that interested advocates have lavished upon it. Originally intended to assist the Judge, it has degenerated into a permanent possibility, if not an absolute certainty, of placing in his path a series of snares and pitfalls. The summing up is subjected to a microscopic examination. Molehills are magnified into mountains and then Ossa is piled upon Pelion until the original case is buried fifty fathoms deep.

In its issue of May 29, 1909, the leading journal has the following comment on this case :—

'If the Court is asked to review convictions upon charges of conspiracy in which the volume of evidence is unusually great, the question of admissibility and corroboration of evidence frequent, and the appellants may have plenty of means and will do their best as they are entitled to quash the conviction, the Court may be occupied for days in discussing one case. Only let half a dozen appeals of like nature come before the Court and the work of the King's Bench may be brought to a deadlock. The state of the lists is now such that, having regard to the impossibility of actions now set down being tried for very many months, there is practically a denial of Justice. . . . From a public point of view the chief interest of the result is that it will tend, as so many decisions of the Court of Appeal have tended, to raise the standard of judicial direction throughout the country. Already they are not what they were a little time ago. Mere rambling and inaccurate reminiscences of evidence, confidential soliloquies, or uncritical repetitions of the arguments of a favourite advocate will not suffice. If

the Act had done no more than greatly improve the average judicial summing up in criminal cases, it would have justified its existence.'

Rambling inaccuracy! Uncritical repetition! Favourite counsel!

'Do we sleep? Do we dream? Are visions about?' *The Times* does well to be angry. But it blames individuals for the defects of a system which gives our Judges a legal as distinguished from a judicial training. In recruiting the Bench from the Bar we ignore the experience of all other communities. We act in the interest of the Bar, not in that of the public.

In the issue of *Truth* for February 28, 1912, there is the following reference to the Mokau case (p. 505). 'The eternal Mokau case came before the Judicial Committee of the Privy Council last week on a petition by Mr. Joshua Jones for leave to appeal *in forma pauperis* from the last judgment of the Court in New Zealand. The petition was dismissed and the solicitor who presented it on behalf of Mr. Jones was personally ordered to pay £3 15s. fees to the Privy Council. This seems an extraordinary decision, seeing that the Court of New Zealand gave unconditional leave to appeal and that counsel had certified that it was a proper application *in forma pauperis*. It is rendered all the more extraordinary by the fact that the Judicial Committee—so I am informed—declined to hear a statement of the facts for the purpose of showing that there was a *prima facie* case for the appeal. As to the fact that Mr. Jones cannot prosecute an appeal except *in forma pauperis*, there is unfortunately no doubt whatsoever; through the injustice with which he has been treated he is a ruined man.'

*Truth* has been well posted in regard to this case throughout its long history. A diligent search has failed to trace any mention of this appeal in the *Times Law Reports* for February.

This is a melancholy ending to a litigation of almost unparalleled duration. We have no knowledge of the form in which it appeared before the New Zealand Courts.

In *The Times* Law Report headed 'A Clergyman's Application to rescind Decree : a Correction. *Kemp Welch v. Kemp Welch and Crymes*.'

On taking his seat this morning the learned President said :

'I want to make a reference to *The Times* report in the case of *Kemp Welch v. Kemp Welch and Crymes* which was before me yesterday. An error has crept into the report. The report makes it appear that I said this : "As to the rest of the evidence, he did not think that any Judge or Court of Appeal could venture to say that the jury could have come to any other conclusion than they did." I did not say that, and it would not be fair to the co-respondent if it appeared I did say it. I will ask the official shorthand writer to read from his note what I actually did say.'

'The official shorthand writer then read from his note the President's actual words, which were as follows :—

"There was other evidence against the co-respondent. I will not say anything more about it than this. I do not want to express any personal opinion on the matter, but I do not think any Judge or any Court of Appeal could for a moment venture to say that the jury could not, supposing that the trial had been had separately against Mr. Crymes, on the other evidence have properly come to the conclusion they did.'"

From such cryptic and involved pronouncements it is not easy to extract a definite meaning even when the actual words are given—so deplorable is the judicial treatment of the English language. Consequently any attempt at abridgment is doubly dangerous. But abridgment there must be for the Press where space is valuable. Therein is seen a convincing argument against a newspaper report being treated as official. The two

conditions are in their nature inconsistent. Moreover, as there is an official shorthand writer why not print and offer his verbatim report to interested parties at a low figure? In a word, why not adopt the German system?

## APPENDIX J

In Mill's 'British India' we read: 'The greater part of the rights of Englishmen depend upon nothing better than unwritten, undefined laws what is generally named Common Law, that is anything the Judges choose to call Law under no more restriction than certain notions, to a great extent arbitrary, of what has been done by other Judges before them.'

'Englishmen in general have no conception of the extent to which they lie under a despotic power in the hands of the Judges and how deeply it concerns them to see that despotic power taken away.'

'The irrational notion seems to have established itself in the minds of most Englishmen that Courts or tribunals are also Law. . . . Nothing, it must be owned, was ever better calculated to prolong for generations so absurd an opinion as the state of Law in England and the efforts of English lawyers whose interests it eminently promotes. In England, extraordinary as it may seem, the Courts have been at once tribunals and Law. In England the Courts were set up without Law. What they did was to make Law for themselves. And in that deplorable condition the Law remains until the present hour.'

Our readers will not fail to observe, when noting Mill's claim for what good laws and efficient codes ought to be, that his arguments have gained fourfold in force from the fact that our neighbours have proved by actual experience that even more than Mill predicated has been realized. The administration of Justice, more especially



in Germany, is prompt, certain and cheap. If Mill had been invited to fix the minimum Court fee, would he have mentioned 2½*d.*? That is the minimum in Germany. What have we done in this direction? Nothing. We are suffering from the sleeping sickness of Legalism.

According to Gibbon: 'The vain titles of the victories of Justinian have crumbled into dust, but the name of the legislator is inscribed in a fair and everlasting monument.'

Another authority says: 'The Law of Rome in the time of Justinian was, to say the least, as difficult of reduction into a code as the Law of England at the present day. Yet it was thus reduced, though no doubt to the disgust and dismay of many a lawyer of the period. The concurring judgment of thirteen centuries has, however, pronounced the code of Justinian one of the noblest benefactions to the human race as it was one of the greatest achievements of human genius.'

Illustrating the startling inequality of sentences and the frequency with which artful rogues of both sexes escape scot free, Mr. Holmes in 'Known to the Police' mentions a case heard at Tower Bridge Police Court in July 1908: 'A young married woman was charged with obtaining by false pretences £75 in cash and £15 worth of jewellery from an old woman who had been a domestic servant, but who, at the age of seventy, had given up regular work, and was hoping to make her little savings suffice for the remainder of her days. The prisoner was also charged with obtaining by fraud £10 5*s.* from a working man in whose house she had lodged. Evidence was given that the prisoner had an uncle abroad, but nothing had been heard of him for a long time. Two years ago the prisoner spread a report that he had died immensely rich, and left her thousands of pounds. In order to pay legal expenses,

she said, she borrowed money from her aunt, an old woman of eighty. Having exhausted her aunt's money, and left her to the workhouse authorities, the prisoner then proceeded to draw upon the retired domestic, who parted with every penny of her savings and her jewellery. In due time she was penniless also, and had again to seek work at seventy years of age, having no friends to help her. The prisoner then turned her attention to her landlord, and obtained £10 5s. from him. But he became suspicious and wanted to see documents or solicitors. She gave him the address of her solicitors in Chancery Lane. Then he insisted upon accompanying her to see them. He compelled her to go, and on arriving found the address to be that of a bank. He then communicated with the police and she was arrested. She admitted that the whole story was false and that she was very wicked. It was stated in evidence that the prisoner had an illegitimate child, which she said was the child of a gentleman, and she had then persuaded a young man to marry her by promising £300 from the child's father when the wedding took place. But the young husband never received the money. The lady missionary told the magistrate that she had received a letter from the prisoner, whilst under remand in Holloway prison, expressing her deep sorrow and promising to work hard and pay the money back. Mr. Hutton bound over the prisoner under the Probation Act !

'I wonder what was at the back of Mr. Hutton's mind when he practically discharged her. If the Probation Act is to bring us such judgments as this, it would be well if we had never heard of it. I can imagine no more heartless series of frauds than those perpetrated in this case. The prisoner seems to have pursued her victims with unerring instinct and skill. The old aunt was robbed and ruined. The old domestic, after a long life of work and economy, was robbed and ruined. Then, with increasing confidence in her own powers, she proceeded

to rob her landlord. A continual succession of lies, deceptions and frauds—and then bound over ! ’

Greatly daring, we venture to enlighten Mr. Holmes as to what was at the back of the magistrate’s mind in arriving at such an astounding decision. We suggest that it was not unconnected with this ‘principle’: ‘A promise to pay which is dependent on a future contingency cannot be the subject of an action at law.’ That has been the organ and safeguard of the freedom of many a swindler.

In startling contrast to the mistaken leniency shown to an adventuress in the case just mentioned, Mr. Holmes cites the case of a young man who was tried at the Warwick Assizes on December 12, 1906: ‘Taylor was charged with breaking and entering, and feloniously stealing twenty-four farthings, one gold locket, one metal chain, and ten spoons. To make assurance doubly sure he was also charged with receiving the stolen property. Taylor had been in custody since January 23, 1906. On December 27 of the same year he received his extraordinary sentence, after being detained in prison nearly eleven months.

‘Everything seems extraordinary about this case: the long delay before trial, the severe sentence, the trumpery nature of the articles stolen. I express no opinion about the prisoner’s guilt. Some of the articles were found in his possession and it was proved that he had been spending farthings. That the people whose house had been entered did not suspect the prisoner was clear, as they sent him next morning to repair the door that had been broken. But, at any rate, the jury believed Taylor guilty; for, without leaving the box, they gave their verdict to that effect. One of the objects of the burglary appears to have been the acquisition of the spoons. Mrs. Wilson, the prosecutor’s wife, had been previously married to a man named Vernon, and the spoons in question belonged

to him. It was said that the friends of Vernon wanted the spoons, and Mrs. Wilson admitted that "they would like them, but they had let her alone for twenty years." These spoons disappeared. They were not found in Taylor's possession, but someone had undoubtedly taken them. Mrs. Wilson stated in her evidence that after the burglary there was a piece of paper left on the parlour table, on which was written in pencil, the words 'Mrs. Vernon, after twenty years,' but the paper was missing, and the prisoner's mother had been in the parlour, and had seen the paper which could not be found after she left. Whether Taylor committed a trumpery burglary, whether he did the thing out of mean spite, or whether he was in collusion with others does not matter very much. Punishment he doubtless deserved, but fourteen years for a young man for a silly offence seems beyond the bounds of credibility. But it is true. In June 1907, I approached the Home Secretary, begging for a revision of the sentence, and received a reply similar to that sent to the prisoner's father—that it was too early a date for interference. It is only fair to assume that the Judge was in possession of knowledge that justified his words, if not his sentence, for, in addressing the prisoner, he said: "You have been convicted, and properly convicted; but I know the sort of man you are, from this case, and from the fact that there is another charge against you in the calendar. Fourteen years' penal servitude."

'I am not surprised to read that "the prisoner appeared to be stunned when he heard the sentence and fell into the arms of the warders who surrounded him."

'I am not surprised to read that the prisoner's father and mother rose to their feet and that one shouted "He is innocent!" and that the other went into hysterics.

'But I am surprised to read that an English Judge

could not allow something for parental feelings and that he said fiercely, "Take these people away!" And when the prisoner's father shouted "I can go out; but he is innocent," the Judge instantly retorted "If you don't go out I will commit you to prison."

'Fourteen years for a young man of twenty-two! Fourteen years for a first offender! It requires an effort to make oneself believe it, but it is a fact.'

## APPENDIX K

In 'Études et Discours' by M. Maurice Sabatier (Paris, 1911), p. 6, we read: 'The question was much discussed at first whether it was well to transform into a single body of law the whole collection of usages, local statutes and Roman laws which had been in force for centuries. It is well known that this very question had been the subject of a famous controversy between Savigny and Thibaut in Germany during the first years of the nineteenth century. To-day the question is settled by the accomplished fact. The civil law takes the place of primitive usage everywhere. The unity of civil legislation has been introduced into most civilized countries as a consequence of political and administrative unity. Germany, long under the influence of Savigny, yielded to the necessity of modern times and promulgated a Civil Code. England, which lives [*sic*] proudly on her Common Law and on her statutes and which persists in rejecting all codification for herself, has been constrained to confer complete Codes on India. Everywhere, in a word, codification is regarded as the only method really possible in the evolution of law.'

Again (p. 51): 'Like the Law of Justinian, the Civil Code has conquered the world. Communities who had received it from victory, preserved it after defeat: such

were Belgium, Luxembourg and Geneva. Other communities who had repudiated it after defeat reverted to it and made it their model : such are Holland and Italy. It has penetrated under diverse forms among nations who were entire strangers to it : such are Rumania, Montenegro, Portugal, Spain, the Spanish Republics, Egypt, and Japan. We find it copied, imitated, amplified, improved, or deformed on all continents and under all skies. Of all the Codes that have succeeded or followed it none has had the same fortune. The Code Maximilian of 1756 remains the Code of Bavaria and of Bavaria alone ; the Prussian Landrecht of 1794 remains the Code of Prussia alone ; the Italian Code of 1865, despite its excellence, is still the Code of Italy and of Italy only. The German Civil Code of 1911 is still too young for us to judge of its power of expansion. Up to the present time all other Civil Codes have been purely national Codes, ours alone has had the privilege of being universal.'

Quoting Montesquieu, on page 56 our author says : 'Laws should not be subtle : they are made for people of mediocre intelligence : they are not an exercise in logic but the instructions of a simple father of a family.'

In a case heard in the Court of King's Bench as reported in the Press of June 19, 1911, the question whether a judgment given in an Italian Court could be enforced in this country was decided in the affirmative. For the negative it was urged that the rules of procedure followed in Italian Courts offended against English ideas of Justice, the parties to the action not being permitted to give evidence.

Mr. Justice Lawrence said 'he did not think it possible for an English Judge to hold that the practice in Italy was contrary to substantial Justice, because prior to 1846 the universal practice of the English Courts was to exclude the same evidence.'

## APPENDIX L

In *The Times* of October 7, 1910, there is the report of a speech by Canon Hensley Henson in which one short sentence contains more truth than all the interested panegyrics lavished by Bench on Bar and Bar on Bench in this country and America.

'The democracy which had recently come to political power,' he said, 'was apt to exaggerate the value of political action and to show a touching belief in the power of laws. He had been much struck with this in the course of his American tour. But the cry of the people always was that they could not guarantee the supply of honest men to administer the laws.'

That is the condemnation of the Bar in America. Let the special pleader explain it away as he may. Communities outside Anglo-Saxondom pay quite special attention to the training of Judges. The Bar is the last place they think of making a nursery for them.

A recent appointment to the Bench has been the occasion of this encomium from a perfervid admirer:—

'Tall, handsome, debonnaire, tactful, urbane, he has brought great physical advantages to the aid of his advocacy. He cannot, it is true, thrill a jury like Sir Edward Clarke in his halcyon days; nor carry all before him in an impetuous burst of rhetoric like Sir Edward Carson; nor play upon the business vanity of a special jurymen with the almost uncanny cleverness of Sir Rufus Isaacs.'

In refreshing unconsciousness of the grotesque, the descriptive reporter dwells on the purely histrionic side of advocacy in recording an appointment to the Bench! This is the measure of the demoralization which perverted ideals of a Judge's qualifications have produced. Absolutely oblivious of their own highest interests, the public

have been drilled into regarding the Bench as an opportunity for honouring the shining lights of the Bar. In this matter Legalism demands, and cheerfully obtains, a stretch of abnegation from its adherents unsurpassed by the most fantastic claims of Clericalism or Brahminism.

For what are those gifts and graces which thrill juries, carry them off their feet, play with them, hypnotize them? They are the outfit of the special pleader, the actor-advocate. They belong to the stage. We do not for a moment insinuate that in the cases mentioned solid attainments of the highest kind are wanting. Our point is that only histrionic gifts are accepted as an explanation of promotion to the Bench.

How can we account for the widely different degree of appreciation that has been extended to similar gifts in the actor and the advocate except the long ascendancy of the legal caste? There is no record of any actor, however distinguished, remaining covered in the presence of Royalty. Yet this distinction formed part of the inalienable right of the Serjeant-at-law when he donned the coif.

Meanwhile, the actor was treated as a rogue and a vagabond and sometimes denied Christian burial. Why have our neighbours in France and Germany never spoiled the advocate? It is not that they fail to appreciate forensic gifts. Far from it. But while cordially admiring and adequately rewarding the actor's gifts our neighbours steadfastly refuse to attribute to him an entirely different order of merit from that which his art presupposes and develops.

So with the advocate; our neighbours believe that the qualities that bring him fame are so profoundly distinct from those desirable in a Judge that—the exceptions are negligible and—a safe principle is that they exclude each other. That rooted conviction has found expression in legal enactments. Access to the Bench is denied to



the Bar. No one but a special pleader will maintain that our legal history, past or present, warrants us in continuing to follow the opposite course.

In Dr. Gerland's work on 'The English Legal System' he alludes to the pretension of the Bar that their function is to aid the Judge in ascertaining the truth. He admits that there is a custom which gives colour to this claim. It is this: the barrister looks up cases and submits those that suit him to the Judge! 'So we may swallow this claim,' says the Professor, 'with a grain of salt.' Here we may mention parenthetically that in a review of Dr. Gerland's work which appeared in an authoritative quarter, he is represented as admitting this fantastic pretension without a grain of salt. *Voilà comme on écrit l'histoire.*

Under the heading 'The Law and the Pheasant' the leading journal has the following under date October 25, 1910: 'Insufficient attention has been paid to a case of great interest and no little moment to all who are concerned in the important business of pheasant farming. It was decided in the Court of King's Bench. The appellant, a pheasant breeder, and game farmer on an extensive scale, was convicted at the Chesham Petty Sessions for having purchased twenty-five live hen pheasants; neither the vendor nor the purchaser being licensed to deal in game. . . . If the pheasant farmer does not take out a licence for the sale of game he is liable to conviction and fine; if he does take out a licence his business is destroyed, since everyone knows that, as the Justices averred in their statement of the case "It is essential for the carrying on of the said business that breeders shall be in possession of pheasants during the close season." From this dilemma there seems to be no escape. . . . Clearly it cannot have been the purpose of the framers of the Act of 1881 to destroy the industry which did not

then exist. Yet this is precisely what they are now declared on high judicial authority to have done. . . . The new condition in this case is the growth of pheasant farming into a business involving much capital, much experience, and a good deal of skilled and organized industry. All this is to be brought to a standstill, if not destroyed altogether, because the Court held itself to be bound hand and foot by the ambiguous wording of an Act of Parliament passed before the business in question came into existence, and by certain decisions, not all of them based on cases fully argued, which seem to have interpreted this ambiguous wording in the strictest and narrowest sense. This may be very good law, and having regard to the composition of the Court we cannot doubt that it is ; but it seems nevertheless to be very indifferent common sense.'

It is the same story reiterated *ad nauseam*. Loosely worded Acts of Parliament ; conflicting interpretations of these Acts to the public detriment but to the great advantage of the legal profession. What would be thought of a Government which permitted the purveyors of goods to fix their own standards of length, weight, and capacity and vary them at pleasure, each tradesman being a law unto himself ?

We read in another case, which is cited elsewhere, that the Bench made a certain recommendation to the Legislature with a view to disposing of an anomaly. That presupposes department or official to receive such recommendations. Why is there no mention of such department or official in this case ? An important industry is left on the horns of a dilemma. Our passivity before the Law is a singular phenomenon. It is impotence tempered by incessant grumbling. The truth is that we have come to accept the vagaries of the Law as part of the order of nature. The fact has never been brought home to the people that Law can be made cheap, prompt in its action, and certain in its incidence.

During the first week of December, 1910, it was announced that President Taft in his Message to Congress proposed to introduce certain legal reforms in procedure which were to follow English lines. Whereupon the leading journal called the attention of English litigants to the compliment paid to our laws in such an exalted quarter by a man who is himself a lawyer. The last-mentioned circumstance seems rather a qualification than an enhancement of this piece of civility, because we have seen that it is part of a long-standing habit and a recognition of the solidarity of what we are pleased to call our common legal system.

But as we look in vain for praise outside Anglo-Saxondom we must make the most of such compliments. And there is consolation of a sort for our litigants in the reflection that however high the tariff wall, how wide soever the zone of barbed-wire entanglements round Justice in this country, the condition of litigants in America is still more unenviable.

But we may well ask, why is our Press so ready to emphasize conditions that are worse and entirely ignore those that are better ?

We send Commissions to the Continent to study all sorts of subjects—business, science, art—everything except the most important subject of all, namely: how to make Justice accessible to the million. That most desirable consummation has been achieved, more especially in civil cases, to an extent that is not realized in this country.

It is singularly unfortunate that such comfort as our litigants are offered is of short duration. The excellence of English law is a figment which the leading journal blows into thin air in the leading article in its issue of December 12, 1910. In this the following passage occurs: 'An action is brought in a Metropolitan County Court for £67 3s. ; and the defendant counterclaims for breach of contract. The trial lasts twelve days, or parts of twelve days ; not consecutive days, but extending from

one cause to another over six months. Nor is the case even now over. There was an appeal, which was allowed ; and there may be another appeal ; or the case may go back to the County Court to be tried again with more or less expedition.'

Some of the worst freaks of Legalism are those played with the drafting of Acts of Parliament. This work is often done in such a slovenly manner that no two Judges can agree on their interpretation.

Referring to Lord Shaw's suggestion for a Committee of expert draughtsmen, the leading journal emphasizes the following points which the Committee would have to consider :—

'Does the new statute contemplate the repeal by implication of another covering the whole or a part of the same field as the former ?'

'Is the new remedy to be the only one ?'

'Are certain well-known Common Law doctrines assumed to be still in operation or are they indirectly modified ?'

'How is it possible to reconcile an expression in one section with another apparently at variance in another section ?'

Will our readers believe it possible that we are groping in the dark at this time of day, waiting on leader-writers to urge the adoption of such primitive measures which are the very rudiments of legislation ! And this after centuries of the ascendancy of the most extravagantly expensive legal equipment in the world ! Will our readers ask themselves whether we must not despair of national efficiency while we labour under such a handicap as this ?

In his book entitled 'The Americans,' Professor Munsterberg has the following under the heading 'Justice' :

'Instead of a single book of law embodying the will of

the nation. the decisions handed down by single insignificant Judges in different parts of the world, decisions which originated under wholly other states of civilization and from other traditions still have final authority. Again and again the Judge has to adapt himself to old decisions against which his sense of right morally rebels. . . . The Anglo-Saxon world would say there is no right or wrong until two persons disagree and make a settlement necessary.'

In other words, no one knows what the law is until a case has been tried in Court !

Our author continues : 'The public consciousness would rather endure the crassest absurdities and misunderstandings in public affairs than the least conscious violation in the administration of Justice. Again and again important trials go to pieces on small technical errors, from which the severe sense of Justice of the American is not able to free itself. The public is willing to endure any hardship rather than tolerate any maladministration of Justice.'

In this passage there is a singular confusion of ideas. The Professor means that the public will endure any amount of injustice rather than tolerate the slightest departure from pedantic technicality. The Americans, like ourselves, are a lawyer-ridden people, the slaves of their own legal figments, the thralls of their lawyers, victims of the blight of the Bar, devotees of the cult of advocacy. In usurping the seat, Legalism has done much to destroy the sense of Justice.

Discussing the jury system, the Professor has the following criticism :—

'The judiciary also has its darker side. One must believe fanatically in the people in order not to see what monstrosities occasionally come out of the emphasis which is given to the jury system. The law requires that twelve men chosen from the people to the jury must come to a unanimous decision : they are shut in a room

together and discuss and discuss until all twelve finally decide for guilty or not guilty. If they are not unanimous no verdict is given and the trial has to begin over again. A single obstinate jurymen who clings to his particular ideas is able, therefore, to outweigh the decision of the other eleven. And it is to be remembered that every criminal case is to be tried by a jury. The case is still worse if all twelve agree but agree only in their prejudices. Especially in the South, but also in the West sometimes juries return decisions which simply insult the intelligence of the country. It is true that the unfairness is generally in the direction of declaring the defendant not guilty. The law's delay is also exceedingly regrettable as well as the extreme emphasis on technicalities, in consequence of which no one dares, even in the interests of Justice, to ignore the slightest inaccuracy of form—a fact whose good side too no one should overlook. It is most regrettable of all that the choice of Judges should depend to so large an extent on politics: and that so many judicial appointments are made by popular elections and for a limited term.'

'In the House of Commons' (*Times* Report, November 14, 1912) 'Sir Godfrey Baring asked the Attorney-General whether his attention had been drawn to the remarks of the Judges of the Court of Criminal Appeal in the recent case of *R. v. Ellsom*, in which they regretted that they had no power under the Criminal Appeal Act, 1907, to order a new trial, but were compelled simply to quash the conviction in all cases where they decided that it had been wrongfully obtained, even though the wrong were only technical: and whether, seeing that the same opinion had been expressed on many occasions by the Judges of the Criminal Appeal Court, His Majesty's Government would consider the propriety of passing a short amending Act to give the Court the necessary power to grant a new trial in appropriate cases.

‘The ATTORNEY-GENERAL (Sir Rufus Isaacs): There is no difficulty with regard to this matter if there is merely a technical question involved, because, in the Act it is expressed that a technicality shall not avail. But in this particular case the question involved was a very serious one and went to the merits and roots of the matter. The proposal to introduce legislation is now under the consideration of the Government.’

This reply is nothing short of astounding. One is driven to the conclusion that the Judges of the Court of Criminal Appeal are not aware that a ‘technicality shall not avail.’ In a large number of cases it has availed. In a recent case a murderer was set at liberty on a trivial technicality.

Here is an instance reported in *The Times* of the following day, November 15, 1911: ‘Court of Criminal Appeal. Justices Darling, Hamilton and Bankes. Conviction quashed. *Rex v. Emilio Rufino*. This was an appeal against a conviction. The appellant had been convicted at the Old Bailey last month on a charge of stealing a pair of field-glasses, and had been sentenced to three months’ hard labour and recommended for expulsion.

‘The Court quashed the conviction on the ground that the prosecution had not completely proved their case, but Mr. Justice Bankes said that they felt that the appellant was succeeding on a technicality and they regretted to order his release.’

We confess to experiencing a sensation of weariness of their Lordships’ regrets that they consider themselves bound to release criminals on a mere technicality. But here there is the exceptional circumstance that in the Criminal Appeal Act it has been decreed that technicalities shall not avail. Are their Lordships ignorant of that injunction or are they defying it? It is now late in March 1912, and the Government is still considering whether the Court of Criminal Appeal should have power to order a fresh trial. There is little need for an amending

Act if technicalities are not to avail. Confusion and uncertainty everywhere. No central authority; no Department of Justice.

In his speech at the unveiling of the statue of Bacon in front of the hall of Gray's Inn on June 28, 1912, Mr. A. J. Balfour attempted no extravagant eulogy. Bacon was not the architect of a mighty system: he was a seer. He saw and rebuked the neglect of the patient and childlike attitude of those who would learn what Nature has to teach. He was neither a discoverer nor an investigator, but he contributed powerfully to the production of an atmosphere favourable to discovery and investigation.

This modest estimate will find general acceptance. Bacon's direct achievements were extremely limited. The occasion demanded that Mr. Balfour should mention an aspect of Bacon's connection with law which was not regrettable. Here an unexpected difficulty presented itself. Nor does it appear that Mr. Balfour was aware of it. In blessing Bacon he constructively banned our legal system and, as the greater includes the less, the fraternity of Gray's Inn are involved in the condemnation.

Witness this passage: 'I understand that Bacon's views on codification were far in advance of the times, and, according to some authorities, had even an effect upon that great effort at legal codification, the *Code Napoléon*.' Assuming that the authorities referred to are to be depended upon, this is highly important evidence. Indeed, it forms no inconsiderable set-off to Kuno Fisher's assertion that Bacon's influence on the great thinkers of the after time is a negligible quantity, and that the intellectual parents of Kant, Leibnitz and Spinoza were Hume, Locke and Hobbes respectively—not Bacon.

Without disputing the soundness of this judgment, it may be maintained that he has had intellectual progeny of the first importance by influencing the great Code. The significance of that achievement is thus appraised



by Lord Acton (‘French Revolution,’ p. 274): ‘On August 9th, 1793, an event occurred in the Civil Order which influenced the future of mankind as widely as the creation of the French Army. While the Committee of Public Safety was busy with the Constitution, the Committee of Legislation was employed in drawing up a code of Civil Law which was the basis of the *Code Napoléon*.’

Napoleon himself expressed the opinion in St. Helena that the time would come when his fame would be based on his code rather than on his conquests. And we find that the time has actually arrived when Bacon’s fame is associated with suggestions for such a code. But it is the singular circumstance under which this claim on behalf of Bacon is made that gives it a piquancy all its own.

Inverting the rôle of Balaam, Mr. Balfour in unveiling a statue to Bacon and associating his fame with codification, unwittingly passes judgment on the narrow and bigoted professionalism which despises and rejects the great Elizabethan’s views so that they are still in advance of our times in the twentieth century, notwithstanding the fact that they are supported by the practical experience of France and Germany. What passes muster as codification in this country is a thing of shreds and patches. That is all that our Legalists will tolerate. Mr. Asquith’s contemptuous reference to codification is found in the text.

The world of Legalism is a congeries of pseudo-principles, false sentiment and spurious currency; but it contains nothing more grotesque than the statue of Bacon in front of the hall of Gray’s Inn. The members are not concerned with the scientific aspect of Bacon’s work. Nor shall we do them the injustice of supposing that they have erected a statue to the unjust judge. Thus, by an exhaustive process—and on Mr. Balfour’s authority—we find that Bacon is commemorated as the champion of codification!

There is, consequently, one way of escape, and only

one, from a ludicrous situation. The statue will be a perpetual reproach to the members of Gray's Inn unless they are prepared to justify its existence by becoming converts to a worthy scheme of codification and having the courage of their opinions despite the hostility of exalted quarters.

There is encouragement in the certainty of counting on Mr. Balfour's invaluable support for codification. And, on second thoughts, we prefer to believe that his remarks were not thrown out at random, but that even at the risk of giving umbrage to vested interests he deliberately introduced a subject which has been too long neglected.

## APPENDIX M

In its issue of January 14, 1910, the *Clarion* has an important article on 'Unmarried Mothers in London, Paris, and Sweden.' We make the following extracts:—

'Paris has no less than 66,000 foundlings that the nation fathers and mothers without a taste or touch of pauperism; 4000 every year is the average. Out of these 66,000 girls and boys carefully tended and trained by the public authorities in Paris only 200 have been sent to a reformatory.

'By way of contrast compare the rules of the London Foundling Hospital.

'Children can only be received into the hospital upon personal application of the mothers. The children of married women and widows cannot be received into the Hospital.

'Petitions must set forth the true state of the mother's case; if any deception is used the petition will be rejected and the child will not be received into the Hospital.

'No application can be received previous to the birth nor after the child is twelve months old.

‘No child can be admitted unless the Committee is satisfied after due enquiry of the previous good character and present necessity of the mother, and that the father of the child has deserted it and the mother ; and also that the reception of the child will in all probability be the means of replacing the mother in the course of virtue and the way of an honest livelihood.

‘Persons who desire to present petitions to the Committee may obtain all particulars by applying to the Secretary at the Hospital, but they must not apply to any other officer or servant belonging to the Hospital, or to any Governor, on any pretence whatever.

‘Petitioners must not bring their children until told to do so.

‘Up to the age of seven months, no child can be refused in Paris, be it legitimate or illegitimate, black, white or yellow. After seven months, questions are asked, but they need not be answered ; and no children are refused.

‘In the London Foundling Hospital—so called—it is easier for a camel to pass through a needle’s eye than for a baby to come inside its doors.

‘When Paris has once taken any little children to its breast, it is unwilling to let them go. Parents are not allowed to take them till they have given satisfactory proof that they have good homes to offer and that the children will be put into a good way of earning a decent living and leading a moral life.

‘The children are kept at school till fourteen, and then the boys are put to work at farming, printing, cabinet-making, and other trades. Girls learn house-keeping, sewing, staymaking, etc.

‘Both boys and girls are watched over separately and individually, and if any signs of exceptional ability in any direction are shown, they are sent to a lyceum or college to develop such talents to the full.

‘Sweden, too, has more mercy on unmarried mothers

than England. There are fine Foundling Hospitals in that enlightened country. Nearly every Swedish woman adopts a baby if she has not one of her own or if her family is smaller than she likes.'

In the *Spectator* of April 2, 1910, there appeared a letter of which the following is an extract. The letter is signed 'Lucie Wedgewood':—

'Any mother can get rid of her baby by the simple process of smothering it in bed, "overlaying" it; and the law holds her guiltless provided only that she be sober at the time of the occurrence. If it can be proved only that she was drunk at the time, she can be punished, though, even then, the penalty is not a heavy one. But if she is sober and in possession of her senses, she has done nothing illegal. A recent prosecution by the National Society for the Prevention of Cruelty to Children has proved that this is the actual state of the law at the present time; and the Society has protested in vain.'

Medieval at all points, our law achieves unmitigated barbarity in its callous indifference to all children who do not inherit land.

## APPENDIX N

January, 1910. We observe that Mr. Ameer Ali, the newly appointed Indian member of the Privy Council, suggests, among other reforms, the establishment of arbitration Courts for family disputes. It is only the obstruction of the legal caste that prevents the adoption of the Family Council in this country and India. This step would not involve any outlay whatsoever; no special buildings; no extra salaries. The experience of our continental neighbours is there for our instruction. There

is nothing experimental about the Family Council. There is only the objection that it would materially diminish litigation.

This extract is from the *Daily Telegraph* about mid-December, 1911. It is entitled 'A Spendthrift's Strange Career': 'Truly there has never lived before or since such a spendthrift as the poor 'Jubilee Plunger'; poor in wit and weak as water in will—who shook the foundations of the betting ring and the racecourse, who gambled in thousands of pounds at baccarat as if they were but pence. He spent £250,000! He had gone through a fairly expensive little journey just before he came into his fortune—a mere trifle of £60,000 which travelling and betting in Australasia cost him. Then the first thing he did on becoming a rich man was to borrow £50,000 from 'Coutts' on his securities, out of which he paid Mr. Sam Lewis, the money lender. . . . Thus did Benson launch himself, and very soon he was the prey of the sharks of the racecourse and the gambling dens. . . . It is almost unbelievable that in a single night at cards he should have lost £16,000 or £17,000. . . . Poor deluded fool, he went one day to Sandown Park, lost £15,000 on horses and returned to town to lose £10,000 at cards the same night. . . . Once he lost £8000 in bets at a pigeon shoot in London, which, perhaps, was only one symptom of the disease from which he suffered. Yet we know that sanity was restored with the complete passing of the £250,000; for he wrote a coherent book which he entitled: "How I Lost £250,000 in Two Years." It began: "This book is dedicated to all parents and guardians to whom is entrusted the responsibility of making or marring the future of the helpless children entrusted to their care, wishing them a full complement of discretion and amiability and their wards a happy immunity from the miseries endured during his minority by the author."'

## APPENDIX O

According to Mr. F. E. Smith, K.C., speaking in the House of Commons on July 11, 1910: 'Every honourable member who has married has an obligation to provide for his wife. He was not complaining of that. But no hon. member enjoyed a right to compel his wife to provide for him, however poor he or however rich she might be. An hon. member cannot neglect to provide his wife decent means of subsistence, even if her conduct on the day after the wedding makes it impossible for the most patient man to live with her. If she slanders or assaults anyone the husband is liable; if hon. members slander or assault anyone in no circumstances is the wife liable. She is protected against any attempt on her part, while married, to anticipate her property, and has no personal liability in respect of it. Should she ultimately bring divorce proceedings against her husband, and the husband be successful, he would be called upon to pay her costs and his own.'

It is only fair to say that the leaders in the feminist movement are outspoken in denouncing these unjust laws.

Writing from the Salvation Army Headquarters, in *The Times*, of August 22, 1910, Mr. W. Bramwell Booth says:—

'Here is a young woman obviously feeble minded. She marries a tramp. In the course of about eight years there is a family of six children, three boys and three girls, five of them manifestly deficient. They were all born in the workhouse; and to the workhouse the whole family resorts in bad winters and occasionally at other times when the man is in prison. In times of special relief funds and so forth they are all well in evidence. Presently there will, I suppose, be a third generation also steeped in vice and addicted to crime. Or take still

another class. The mentally deficient are very often clever in certain directions. Dominated by stronger minds they can be led to attempt what to normal minds is regarded as impossible. Such men and women—especially the women—are used in criminal work in a large degree. They not only prey upon society themselves, poor things, but help others to do so and help incidentally to employ the police and the Judges to fill the gaols. Our present system of dealing with these unfortunate people, or rather our present system of letting them alone, facilitates their depredations, steadily enhances their costliness to society as a whole, and—greatest folly of all—encourages the rapid increase in their numbers. All this spells money. Vice and crime are merely another name for taxes.

In 'Known to the Police,' Mr. Holmes has severe condemnation for the marriages which are promoted by certain magistrates and even Judges. His experience is that squalor and misery inevitably attend these unions, but 'nevertheless educated gentlemen of position appear to take pleasure in arranging them. . . . On divorce our leaders have much to say; on marriage with a deceased wife's sister they have advice to give. Are the poor to have no guidance? Are penniless, ignorant, and even gross young people to be engineered into promiscuous marriage without protest? Not very long since one of our Judges had before him a man charged with the attempted murder of the girl with whom he kept company. His jealousy and brutality had alarmed her, so she had given him up. But he was not to be got rid of so easily, for he waylaid her and attempted to murder her by cutting her throat. He was charged; but the indictment was reduced to one of grievous bodily harm. At the trial the young woman was asked by the Judge whether she would consent to marry the prisoner, adding that if she would consent it would make a difference in the sentence imposed.

The matter was adjourned to the next session, the prisoner being allowed his liberty that the marriage might be effected. During the adjournment they were married and when next before the magistrate the marriage certificate was produced. She saved the man from prison, and the Judge bestowed his benediction in the following words : " Take her away (as if forsooth she had been the prisoner) and be good to her. You have assaulted her once ; don't do it again." Thus giving him every opportunity of doing at his leisure what he had barely failed to do in his haste.

' I ask is not a procedure of this kind a grave misuse of the power of the Courts ? Is there any Justice about it ? Is it fair to place on a young girl the onus of deciding whether or not her would-be murderer should be punished or not ? Is there any sense of propriety in holding a half-veiled threat over her, against her better judgment, to marry a jealous and murderous brute ? I can find no satisfactory answers to these questions, and I contend that such proceedings ought to be impossible in our Courts of Justice.'

We are indebted to *The Times*, of January 25, 1912, for the following notes on the Swiss Code of Civil Law which came into force on January 1, 1912 : ' There are three systems of marriage. They are based on a union of goods, community of goods, or, as in England, separation of goods. All marriage contracts after January 1, 1912, and as far as possible those prior to that date, will be presumed, unless an agreement to the contrary exists, to be based on the first system, which allows the wife to be the legal owner of anything she may have brought with her on marriage, and of any inheritance she may afterwards receive. The husband, however, has the management and enjoyment of such property, with certain restrictions. He may, for example, invest his wife's money, of which he then enjoys the interest ; but he must on her demand



render an account of his stewardship. Otherwise she may insist on a separation of and become partly responsible for debts, whilst the man must hand over not only her share of the estate but one-third of any income in excess of what they had when first married. In the event of the husband's bankruptcy the wife may claim that half her property shall be handed over to her at once and as regards the other half she will receive the same dividend as the creditors. Community of goods means the loss of all individual rights to any part of the joint estate. Should the husband become bankrupt, however, the contract is dissolved, and the wife has the same rights as in the case of union of goods. Separation of goods makes the wife entirely free (except to engage in business or a profession without her husband's consent) and entirely responsible for all her actions and debts ; but the husband may demand a contribution from her own personal income or means to any jointly incurred expenses such as house-keeping. Should her husband become bankrupt she enjoys no privileged position.

‘The new Code shows marked leniency to an unmarried mother, and is far more humane in its treatment of illegitimate children, while at the same time more severe on the fathers of illegitimate offspring.

‘The powers now bestowed upon children's guardians (public guardians) are very great and would certainly be resented in England. Should parents fail in their duty, these guardians can remove the children and deprive the parents of all control in their education. In such cases a guardian is appointed *in loco parentis* and such may be of either sex. Parents thus deprived of the control of their children must, however, still contribute to their support and the cost of their education. Again, if the father be a drunkard all power over his children may be taken from him and vested in the mother alone ; or the children may be taken from the parents and put in an institution or with a family.

‘As regards the situation of unmarried mothers, it is now ordained that they shall always have the right to require the paternity of their offspring to be fixed within a year of its birth. The father of an illegitimate child can be compelled to contribute to its support a sum fixed in accord with his own social position, and to continue this contribution until the child has reached the age of 18.’

In the issue of January 19, 1912, *The Times* has the following passage as the conclusion of a leading article: ‘Another reflection is forced upon us by the facts disclosed in these decisions. The whole subject of the Marriage Laws of the three parts of the United Kingdom was investigated by a strong Commission which reported in 1868. The differences were then carefully examined and suggestions as to amendments were submitted. More than forty years have passed, and the confusion and uncertainty which the Commissioners then pointed out remain virtually untouched. This is not creditable, and unfortunately there is no likelihood that the matter will be taken in hand.’

There is the long history of our Legalism, confusion and uncertainty for the public. But these are the conditions which have secured the ascendancy of the legal caste. They have decreed themselves such enormous salaries that we cannot afford a real department of Justice whose business it is (in other countries) to give adequate effect to such recommendations as are mentioned above. It is not only the expense that stands in the way of such a department. Legalism does not require it, for reasons given in Chapter XXIV.

In the *Daily Mail* of April 9, 1912, we read of a new departure in the United States: ‘At the Cathedral of St. Peter and St. Paul in Chicago this week are being solemnized the first marriages under a new scheme recently announced by the dean and chapter, by which no couples will be married there in future unless they come to church

provided with a certificate of good health. . . . Dean Summer says that notwithstanding some unfavourable criticism, he will persevere in the new policy.'

## APPENDIX P

The following letter in which a reference is made to divorce appeared in *The Times* of March 29, 1912, over the signature of Dr. Silvanus P. Thompson. He wrote : 'Sir Almroth Wright's trenchant letter would carry more weight if it did not ignore or deny the one thing which has made into advocates of the suffrage many women who are bitterly opposed to the deplorable tactics of the Pankhurst rabble. That thing is the continued violation by law and under the *ægis* of law of the very "covenant" which Sir Almroth Wright declares to be "within the frontiers of civilization." There is, in fact, a continued failure, both of the law as administered and of the unwritten code of social law, to put an end to crimes against the person of women. The absurdly low sentences against men convicted of assault, the utterly inadequate protection against seduction, the tolerance by society of a double standard of morals in the præmarital state, the advocacy, even by an eminent Judge, of an inequality between man and woman in the laws of divorce—these are the things which give the lie to Sir Almroth Wright's complacent assumption that "under this covenant a full half of the programme of Christianity has been realized." Half the facts having been conveniently omitted, his argument from physiology is at least half a fallacy ; and even a fallacy need not degenerate into a tirade.'

In the letter of which the above is a criticism the writer takes high ground. This is how the covenant is described (*Times*, March 28) :

'It belongs to those unwritten, unassailable and

irreversible commandments of religion, *ἀγραπτα κἀσφαλὴ θεῶν νόμιμα*, which we suddenly and mysteriously become aware of when we see them violated.'

It is a scientific duel. In countering the bacteriological Almroth the electrical Amurath succeeds in demolishing over two and a half columns of leading type in thirty lines.

The following report appeared in the *Daily Mail* of June 12, 1912: 'An uncut wedding-cake over nine years old was exhibited in a breach of promise suit between two aged people whose mutual recriminations have caused much amusement in the Brooklyn Court.

'The defendant is Mr. Samuel Myers, aged eighty-three, and the plaintiff is Mrs. Charlotte Laws, a widow of sixty-two, who pleaded that her life had been thwarted and blasted, and sought £6000 damages.

'The defendant, our New York correspondent says, is the wealthy proprietor of an hotel at Rockaway Beach and of the "Million Dollar Pier" upon which it stands. Mrs. Laws is herself a prosperous estate agent.

'She told the Court that she had been made happy for four years by the prospect of marriage, but the defendant had wrecked her bright prospects by marrying another woman even older than herself.

'The proposal appears to have been made on New Year's Day, 1903. According to the widow, Mr. Myers was visiting her, and seeing an uncut cake on the table said, "Keep it for our wedding."

'The widow tearfully added that she had preserved it uncut ever since. The jury awarded her £100.'

This is an extract from a pamphlet published by the 'Divorce Law Reform Union': 'In England a male is deemed capable of marriage at 14, and a female at 12; and although parental consent is commonly demanded of persons under 21, any fraudulent statement of its having

been obtained does not invalidate the marriage. In Germany a male cannot marry under 21 nor a female under 18 whether parental consent is available or not.

‘In England a man may, and not infrequently does, cut his wife and family out of his will. In Germany the rights of wife and children are properly safeguarded by limiting this liberty of disposition.

‘In England a spendthrift or a dispendiac can only be controlled when he has spent all his money. In Germany such individuals are protected from themselves by a Family Council.

‘In England an illegitimate child can never be legitimated by the subsequent marriage of the parents. In Germany the humane and reasonable opportunity of making reparation to the child exists as a matter of course.

‘In its essential principles, German law is in line with that of most civilised countries while our law is not.’

## APPENDIX Q

Writing from the Authors’ Club to the *Daily Mail* on the new law of libel, Mr. Charles Garvice says : ‘We unfortunate novelists have been driven up a tree by the legal decision on the question of names in fiction ; and I am almost tempted to wish that some person with a name similar to one in a popular novel would bring an action against the novelist—any novelist but me. It does not seem possible that the obviously ridiculous decision should be upheld ; if it should we shall be all driven to painting post-impressionist pictures or concocting advertisements for other people.’

Our readers will observe that the decision which Mr. Garvice irreverently describes as obviously ridiculous has been upheld by the House of Lords.

We read in the *Evening News* of March 9, 1911, that in a novel to be published shortly, the fear of an action has led the author, Mr. St. John Adcock, to have the following notice printed on the first page :—

‘ I solemnly and sincerely declare that this is a work of fiction ; that all the characters were invented by me and have no originals in real life ; that if any living man or woman possesses the same name as any of them, it is nothing but an interesting accident ; and as there is no copyright in names, I do not think he or she can consider there is cause for tears. Unlikely as it may seem, my own name has twice to my knowledge been given to characters in fiction, once by Theodore Hook and once by a novelist who still survives. Theodore Hook had been dead a long time when I was born, but I no more derived my surname from his pages than I imagine that the surviving novelist derived the name of his character from me. Even if he did I forgive him, but without prejudice to my right to sue him for libel if it ever happened that my reputation is no longer robust enough to take care of itself.’

Under the heading ‘ The King’s Bench as a Court of Honour ’ the leading journal of March 14, 1911, has a weighty leading article in which the following passage occurs : ‘ Along with this diminution of disputes as to the solid interests of men has come an outburst of actions for defamation, many of them concerned with unspeakably small issues, giving opportunities for pouring out floods of gossip and tittle-tattle, often diverting to the spectator, always remunerative to the Bar, but turning on matters of no concern to any but the parties and of very little to them.

‘ The making of a sensational libel action is simple. Take a few unimportant words in speech or print, drag them from oblivion, and make them the kernel of a vast mass of documents ; instruct clever counsel on both sides ;

call a large number of witnesses able to say something more or less relevant ; and a dispute barely worthy in itself to occupy a quarter of an hour in a police court, may engage a special jury several days and develop into a sensational trial. If the parties have plenty of money, the case will go further. . . . Juries are to some extent responsible for the increase in libel actions. They too often agree to magnify the trivial. The average damages which they give are rising. In cases where twenty years ago plaintiffs would have been glad to recover fifty or sixty pounds, they now look, and not in vain, for two or three hundred. There may be—there generally is—no proof of actual injury to the plaintiff. It may be quite uncertain whether the aggrieved person had any reputation to lose ; his counsel's ingenuity may have been sorely tried to suggest the bare possibility of actual loss. But a compassionate or sympathetic jury may put into his pocket some hundreds of pounds.'

We shall not realize the full significance of this pronouncement unless we consider it as part of the inevitable trend of our Legalism in India and the United States as well as in its home in England. In the three countries that suffer from the blight of the Bar—which is Legalism—the environment differs widely. We shall not, therefore, find identical but rather analogous developments with progressive degeneration on parallel lines. Delay, expense, and uncertainty are common features, but the effects of the first two are obscure ; they encourage injustice ; they are a power on the side of the oppressor, but his victims are inarticulate and their wrongs rarely figure in public chronicles. Whereas the third characteristic of our legal system, its glorious uncertainty, makes an irresistible appeal to gambling propensities ; offers attractive chances to the speculative solicitor and the unscrupulous client who uses publicity as a counter in the game of securing plunder by forms of law. Neither client nor solicitor has the faintest belief in the justice

of the case, but those gamblers in Legalism back an advocate whose reputation for verdict-snatching stands high, just as a section of the racing fraternity back a jockey without knowing anything of his mount. So far back as twenty-five years ago, litigants in Madras flocked to consult an astrologer who pretended to foretell the outcome of a law suit, so profound was the impression in the popular mind that the merits of the case were absolutely negligible. Nothing has tended to remove the impression in recent years ; on the contrary, it has been deepened by the accumulation of authorities and the increasing ingenuity of the legal sophist. Corroborative evidence is supplied in abundance by the United States, where we read that the sheriff's men were some time in clearing out ' bookmakers ' from the precincts of the Court at a notorious trial.

This is an extract from *The Times* leading article of March 23, 1912 : ' There are rarely wanting illustrations of the unfairness of the law of libel in its effect upon newspapers or of their liability to be worried by frivolous, unfounded, or preposterous actions. . . . In the action by Mrs. Day against *The Times* the jury promptly returned a verdict for the defendants , and the Judge stated that there never was a case for the jury to consider. It may seem surprising, in view of this opinion, that he did not stop the case at an earlier stage. . . . For the multitude of unfounded actions of which newspapers are the objects injuries are in no small degree to blame. . . . But the main fault is in the state of the law of libel, which becomes more and more unsuitable to things as they are. Probably the amendment needed above all others is the checking of actions for libel brought by those who may have nothing to lose. . . . Newspapers in particular are exposed to the attacks of adventurers whose sole asset consists of a grievance, generally imaginary. . . . Newspapers have of late fresh causes of complaint. By a series of decisions familiar to lawyers, plaintiffs in libel actions are per-



mitted to put in the early stages of a case questions to defendants which may be harassing, and which remove obstacles in the way of speculative suits. . . . A point meriting consideration is the exorbitance of the sum awarded as damages. . . . Such peril exists wherever the law of libel is used, as it sometimes is, as an instrument of annoyance, oppression, extortion, or terrorism.'

In *The Times* report of December 18, 1911, under the heading 'Mrs. Weldon's Appeal' :—

' Mr. Bankes in resuming said. " The books had not been read as they ought to have been, before they were offered for sale. . . .

' Lord Justice Fletcher Moulton: If the law of libel was carried so far it would become a curse instead of a defence.'

While instructing the jury that there was no case in a claim for damages, Mr. Justice Lawrence said (April 10, 1911) :—

' The art of bringing libel actions had been brought to great perfection. There were some people who made more by bringing libel actions than they could ever make by honest work in the course of their lives. In some cases juries had awarded considerable sums as damages, and the consequence was that the Courts had quite a sheaf of these actions.'

The freakish decisions under the law of libel have led to such results as the following. We read in the daily Press that ' The publication of a serial story entitled " Motley and Tinsel " led to an action and damages being awarded against the writer, " Mr. John K. Prothero " (the pen-name of Miss Keith Prothero) on the ground that the name of the chief character in the story corresponded with that of a living person. As a protest the story has just been published in book form ; the names of well-known literary people being given—by consent—to the characters good,

bad and indifferent. A writer in the *Daily Mail* jocularly suggested this course some months ago.'

The authoress gives her own name to the principal character, which was the subject of the libel action—that of the theatrical manager—remarking in the preface to the new issue, 'Extraordinary as the law of libel appears to be, I have not yet learned that one can libel oneself.'

Other characters are :—

Robert Barr	.....	Prothero's factotum
Edgar Jephson	.....	A colonel and subscriber to Prothero's syndicate.
Cecil Chesterton	.....	An actor.
Hilaire Belloc	.....	Theatrical manager.
George R. Sims	.....	A cabman.
George Bernard Shaw	..	Stage-door keeper.
Barry Pain	.....	A deaf and dumb man.
Pett Ridge	.....	The call-boy.

In the leading columns of *The Times* of June 6, 1912, we read under the heading 'Arrears in the King's Bench' : 'No doubt the prominence in Courts of what may, in the absence of a better term, be called the clap-trap libel action, is the cause of much judicial waste of time. The plaintiff wants to magnify his grievance, often imaginary : he wishes to splash about and be in the public eye as long as possible ; and to expect him or his counsel to study brevity is to thwart the very object of his being in Court.'

The following extract is from *The Times* of July 20, 1912 : 'We believe that there is no part of the British law so oppressive (if we may apply that term to any part of a system which is, upon the whole, so excellently good) as the law of libel. There are scarcely any anomalies which it does not embrace. A libel is itself undefined and indefinable ; and the law upon it punishes before trial. It punishes men wholly free from evil intention, and unconscious of guilt ; it suffers an Officer of the

Crown to substitute his discretion, instead of the finding of a true bill by a Grand Jury ; and the consequent practice in our Courts does not, we will venture to assert—whatever lawyers may say of each other's clemency, and liberality, and humanity—tend to abate the theoretic rigour. We have thought the number of official informations by the late Attorney-General a great and monstrous oppression , but it is evident that this is not the fundamental evil , the right to file such, under all circumstances of libel, is the radical hane. A man who acts according to law, or as the law allows him, is only a moral offender, if he acts with rigour ; it is the law itself which should be amended, when it places an arbitrary power in the hands of anyone ; and that the power to file an official information—to call upon the person who is the subject of it to give bail before trial—or to send him to prison without a conviction, and whether such a defendant is tried or not tried, still to burthen him with all the trouble and expense and suffering of such preparatory proceeding—that this, we say, is an arbitrary power—a power destructive of free discussion and of freedom altogether—cannot be doubted by unprejudiced persons.'

When the remarks of Lord Justice Fletcher Moulton in the text are compared with this article, we have a measure of the progress made in a century towards the enactment of a satisfactory law of libel. Here as everywhere we are confronted with petty tinkering unconnected with any recognized principle.

## APPENDIX R

The following extract is from the *Clarion* of November 28, 1909 :—

' On November 22nd, 1908, Fenton Fountain, aged 9, living at Halton, a small village three miles from Leeds,

and under the jurisdiction of the West Riding magistrates, was arrested together with Fenny Fountain, aged 14, charged with stealing a duck. No intimation had been given to the children's father either by the owner of the duck or the police. On the Tuesday following (the boys having been released on their father's bail in the meantime) the case was tried before the West Riding Bench ; Mr. W. H. Maude in the chair.

'The boys' father was present with witnesses to the boys' good character, they never having been charged with anything previously. The father's evidence was refused and he was stigmatized as a dangerous man, a drunken loafer who earned a precarious livelihood in public houses, and therefore not fit to have charge of children.

'The man got his duck returned alive and well. Fenton was sent for seven years to an industrial school and two years' supervision. Fenny was sent for four years to a reformatory.

'A petition drawn up by William Wright, solicitor, was signed by 800 residents, practically the whole adult population, and included two doctors, Mr. Basket and Mr. Pogson, together with the boys' schoolmaster, Mr. Owna, Halton Council School, Mr. Alderman Buckle, Councillor Firth, Councillor Bradley, and influential residents in Leeds who had known the father for ten years, some who had known him for twenty years. The nominal prosecutor and owner of the duck also signed the petition praying for the boys' release. Mr. O'Grady, M.P., presented the petition, together with many character testimonials and the following facts :

'The boys found the duck (a white one) in a field adjoining their pigstye which they rented for threepence per week out of the pocket-money provided by their wastrel father, who permitted them to keep a few rabbits and ducks as a hobby. The duck had wandered from some others two fields away and was resting. The boys

thought it was lame. They picked it up, put it in a handkerchief, put it with their own, fed it and let it run about with their own in the field and yard for two weeks. There was no attempt at secrecy, and as no person ever claimed the duck, they thought they had found it.

‘ Mr. Gladstone eventually promised to reopen the case in twelve months. That time has now expired but the boys have not been released.’

The *Author*, of January 1, 1909, reports a case which deserves mention among freak decisions :—

An author sent a manuscript to a publisher. The publisher received the box but without the MS. The writer sued the railway company for £10—which was all he thought he could claim under the Common Carriers Act. The magistrate thought the defendants were protected by that Act. If an article is of more value than £10 the fact must be declared and the package insured. The magistrate said the carrier was absolved from paying anything when an uninsured package exceeded £10 in value !

Unfortunately for the plaintiff, the publisher testified that a previous book by the same author had been worth £300. That evidence was fatal to his claim ! Had he been an unknown writer whose MS. was worth little or nothing he would have succeeded ! Such are the surprises of Legalism.

January, 1910. We read that Mr. H. Wells Chandler has been trying to persuade the Law Society to favour an experiment which is described as revolutionary.

He wishes to give all potential Judges a preliminary trial as ‘ Commissioners.’ Failures would then be quietly dropped. It is an excellent suggestion which has not the faintest chance of being adopted ; but that it should have been seriously proposed is noteworthy. If our Judges were specially trained and appointed in early life to

subordinate judicial duties there would be ample means of judging between the able men and the 'hard bargains.' Why should the most important of all duties be treated in a way that is opposed to universal experience ?

The *Auto* of July 30, 1911, has the following : 'The fact that the Commission for the selection of Justices of the Peace has not been able to see its way round this grave question of appointing men to the magistracy who are notoriously anti this or that, seems to constitute an indictment of the whole system of manning the magisterial benches of the country. Under the existing method, which the Commission does not see its way to amend materially, we get men on our benches, empowered to deal by word of mouth with the property and liberty of the subject, who are not only devoid of the most elementary training in law or methods of jurisprudence, but who may be, and often are, steeped to the lips in prejudice of one kind or another. Now, a trained lawyer with strong prejudices is bad enough in all conscience, but he has at least this merit, that he can set his training and knowledge against his bias when he has to deal with cases in which he has an "interest of opinion." Far different is it in the other case, where the Judge is prejudiced generally, and only possesses that amount of legal training which can be imbibed in the conduct of a successful provision-dealer's business. The report of the Commission from beginning to end reads very much like a confession that the whole system needs recasting in its entirety. Seemingly, however, the Commission has realized that it is far too large a task to be undertaken with any chance of success, so things must be allowed to go on much as they are, with one or two minor improvements here and there, so that the Commission cannot be said to have ended in utter futility.'

In this connection the extraordinary campaign which has been organized to exert pressure on the Lord Chancellor and keep him strictly to party considerations

in magisterial appointments is a phenomenon of the most depressing description. It suggests that we are, as a nation, incorrigible in our attitude to the Bench. The need for special training is utterly ignored. Promotion to the junior Bench is the fitting reward of petty political service. Precisely the same motive is too often operative in recruiting the senior Bench. When a reforming Lord Chancellor—that rarest of rare personages in our history—shows a determination to break away from this policy of crude stupidity, he is subjected to treatment almost amounting to persecution. Better things might have been expected from the quarter whence this most mistaken movement was engineered. A more worthy endeavour is to strive for the exclusion of political considerations in recruiting the Bench ; to demand a specially trained judiciary ; to insist that they shall be graded without a break of legal gauge from the junior magistrate to the most exalted Judge ; to treat the magistracy as a valuable training-ground for testing and developing the judicial capacity of the Judges of the future.

All *a priori* considerations dictate this course ; all experience confirms it. By no other process can an adequately equipped judiciary be organized. And of all possible undesirables, the judicial undesirable is assuredly the worst.

According to the *Daily Mail* of September 1, 1910, the following dialogue took place on the previous day in Birmingham Petty Sessions Court between Mr. Arthur Wright, a solicitor, and the Chairman of the Bench, Mr. Phillips, who considered some of the solicitor's questions to the witness immaterial :—

‘ Mr. Wright : The Germans, whether they eat horses or dogs, have Doctors of Law to preside over their Petty Sessions. Here we have gentlemen who do their best but are not competent.

‘The Chairman : We are not here to be insulted.

‘Mr. Wright : I won’t be insulted here either. The unpaid magistracy are not fit to have the power of the lock and key over people.

‘The Chairman : You are here to defend your client.

‘Mr. Wright : The Bench does not understand its business, unfortunately.’

A strange scene between magistrates is reported in *The Times* of January 22, 1912 : ‘Before the Berkshire Justices sitting at Windsor on Saturday a gate-keeper was charged with assaulting a constable. . . . After the evidence had been taken, the Chairman said that the Bench were agreed upon a conviction, and a fine of £2 including costs would be imposed.

‘Sir John Soundy rose and said : Mr. Chairman—You say the Bench. I respectfully submit that only three magistrates have been consulted.

‘Mr. F. T. Ryland, the defendant’s solicitor, said that being so, he would like to know whether the magistrates would consider again before he decided to take the case further. It was a very grave matter.

‘Sir John Soundy : It is a very common occurrence.

‘The five magistrates then deliberated for several minutes and the Chairman announced that they still adhered to their former decision.

‘Mr. Ryland, speaking on behalf of his profession, said that he regarded the conduct of Sir John Soundy as perfectly magnificent. . . .

‘The Chairman : You make a mistake—he has not been disallowed from taking part.

‘Mr. Ryland : He was ignored. I have been sitting here all the morning, and he and the Mayor of Windsor have been ignored.

‘Mr. Rodie-Thompson (another magistrate) : You have no right to say that.

‘Mr. Ryland : It is a fact. . . .



'The Chairman : It was an oversight.

'Mr. Ryland : You absolutely ignored them. . . .

Surely a singular Bench where such oversights are possible.

In 'The Village Labourer, 1760-1832,' by J. L. and Barbara Hammond, we read, page 20 : 'The Justice of the Peace was unpaid. The statutes of Edward III. and Richard II. prescribed wages at the handsome rate of four shillings a day, but it seems to be clear, though the actual practice of the Bench is not easy to ascertain, that the wages in the rare instances when they were claimed were spent on hospitality and did not go into the pockets of the individual justices. Lord Eldon gave this as a reason for refusing to strike magistrates off the list in case of private misconduct. "As the magistrates gave their services gratis they ought to be protected."'

## APPENDIX S

This is from Charles Lever : 'Then, to be sure, what droll fellows they are ! How they do quiz the witness as he stands trembling there ! Turning the whole battery of their powers of ridicule against him ; ready if he ventured to retort to throw themselves on the protection of the Court !

'And truly if a little Latin suffice for a priest, a little wit goes very far in a Law Court. A joke is a universal blessing ; the Judge, who, after all, is only "an old lawyer," loves it from habit ; the jury, generally speaking, are seldom in such good company, and they laugh from complaisance ; and the Bar joins in the mirth on the great reciprocity principle which enables them to bear each other's dulness, and dine together afterwards.'

The standard of humour in our Courts is apparently as low as in Charles Lever's time. The feeblest attempts

never fail to be punctuated with laughter. Can our readers imagine anything in a third-rate music-hall more puerile than this ?

In a rating case about some bathing huts at Margate, reported in *The Times* of January 18, 1912, the appeal was from a decision of the magistrates :—

‘ Mr. Danckwerts : They have held that there is no occupation at all of any part. I am told that there was an ex-Indian Judge upon the Bench, and I am not sure that that does not account for it. (Laughter.)

‘ Mr. Justice Pickford : Do you mean that he has been applying Hindu law instead of English ? (Laughter.)

‘ Mr. Danckwerts : That is the sort of thing I should suppose. (Laughter.) ’

Legalism produces two varieties of cynic : the bitter and the silly. In this connection a problem for the psychologist suggests itself. It is this : Is there a relation of cause and effect between the notorious cynicism of Bar and Bench on the one hand and the callous indifference to the long detention of prisoners before trial ?

How few are the references to this horror in circuit reminiscences ! The state of things as recently as 1907 is hardly credible. In that year no fewer than 5691 persons were in prison for periods under four weeks awaiting trial ; 1965 from four to eight weeks ; 962 from eight to twelve weeks ; 334 from twelve to sixteen weeks ; and 97 above sixteen weeks before trial. Mr. Edward Carpenter has devoted much time to this subject. Let us hear what he says about unconvicted prisoners. ‘ The Report of 1895,’ he writes, ‘ quotes with approval the Prison Act of 1877, which declares that these prisoners are confined for safe custody only, that special rules are to be made regulating their confinement in such manner as to make it as little oppressive as possible ; but it goes on to say that this provision has never been

adequately carried out. They are in solitary confinement nearly all the twenty-four hours. Their food is not of the lowest, but a low scale of diet—that is, be it understood, a low scale of prison diet. . . . Our law is supposed to treat every accused person as innocent until he or she is proved to be guilty. But the accused who are not on bail are actually subjected to little short of the rigours of ordinary imprisonment. Of course if a man is well off he not only has a good chance of getting bail, but even if he fails to get it, he can be supplied with food by his friends and can see his solicitor freely and arrange about his defence. Even then the solitude, confinement, and anxiety may be bad enough; but a poor man, nearly starved on prison fare, and unable to employ a solicitor, is in no condition to get up any kind of defence, and easily succumbs to the carefully prepared evidence against him, however false it may be.

‘Criminal cases,’ says the *Saturday Review* of July 31, 1897, ‘are constantly disposed of at Sessions and Assizes in the most hasty and perfunctory manner; the undefended prisoners hardly realizing the nature of the charges or the bearing of the evidence. How can a prisoner with no writing materials or aids to memory be expected to keep in clear order in his mind the evidence of half a dozen witnesses so as to deal with them all when, dazed and bewildered, he is told all at once that he may address the jury?’

‘In the case of a very large number of undefended prisoners it is not too much to say that they are daily being sent to long terms of imprisonment or penal servitude on what is little more than the report of a police constable.’

The Court of Criminal Appeal has no doubt done much to remedy some of these abuses; but it has not touched the question of the prolonged detention of unconvicted prisoners. So far we have only referred to the case of prisoners without distinction of offence. But what of those who were acquitted? During the year 1907 the

number of persons who were detained in prison for periods under four weeks before trial was 782 ; these were all acquitted. The same remark applies to 225 who awaited trial from four to eight weeks in prison ; to 90 who lingered from eight to thirteen weeks ; to 43 who were detained from thirteen to sixteen weeks, and to nine who had the special misfortune to be immured for over sixteen weeks—we are not told how long over sixteen weeks—to await trial at which they were acquitted. We may take it for granted that not one penny of compensation was paid to these unfortunate victims of a barbarous system, if system it can be called, where there is no purpose on the part of anyone concerned to inflict cruelty ; but such is the confusion, muddle, and mismanagement that grave injustice is done. Well may these poor waifs and strays of humanity say :—

‘ We know not whether Laws be right,  
Or whether Laws be wrong ;  
All that we know who lie in gaol  
Is that the wall is strong,  
And that each day is like a year—  
A year whose days are long.’

The late Mr. Justice Wright declared that the long detention of prisoners before trial was an outrage and a disgrace to the country. Only three years ago a man was tried before Mr. Justice Walton who had been five months in gaol awaiting trial. According to the Governor of the prison he had been confined to his cell twenty-one hours out of twenty-four.

Lord Brampton has denounced this abuse, and the Bar Council has protested against it. In some quarters the whole blame is thrown on the Circuit system. In order to ascertain whether that system alone is to blame, we have made a careful analysis of the figures for 1907 as regards the detention before trial of persons afterwards acquitted, with the following result :—

Of the 782 persons who were detained under four weeks, 76 were tried at the Central Criminal Court ; 162 at the Assizes ; 389 at the County Sessions, and 155 at the City and Borough Sessions.

Of the 225 who were in prison from four to eight weeks, 24 were tried at the Central Criminal Court ; 58 at the Assizes ; 78 at the County Sessions, and 65 at the City and Borough Sessions.

Of the 90 who were acquitted after being in prison awaiting trial from eight to twelve weeks, 2 were tried at the Central Criminal Court . 47 at the Assizes ; 22 at the County Sessions, and 19 at the City and Borough Sessions.

Of the 43 who had the misfortune to be kept from twelve to sixteen weeks awaiting trial, at which they were acquitted, 24 were tried at the Assizes ; 6 at the County Sessions and 13 at the City and Borough Sessions. We come now to a still more unlucky group of 9 who were actually detained in prison for periods over sixteen weeks (the exact time is omitted, apparently for very shame) ; 1 was tried at the Central Criminal Court ; 7 at the Assizes and 1 at the City and Borough Sessions.

Obviously, then, the Circuit system cannot be saddled with the whole responsibility for a state of things which is a grievous scandal in a country claiming to be civilized.

We imagined that there was to be an end of this ancient abuse when we read some years ago that a Committee had been appointed under the Chairmanship of Lord Macnaghten to study the question and suggest remedies. It will be remembered that the present <sup>1</sup> Lord Chancellor—when a member of the House of Commons—made the following statement in the year 1897, referring to the delay which often occurs between the committal and the trial of a prisoner : ‘ It frequently happens that a person who has been kept in prison for two, three, or even four months is found not guilty. It is perfectly shocking that such a state of things should exist.’

<sup>1</sup> Lord Loreburn.

Whether Lord Macnaghten's Committee is still sitting, or whether it has sent in its report, we know not ; but if we are to judge by the following extract, little improvement has been effected. In the issue of *Truth* for March 13, 1912, we read : 'In 1910, the last year for which there are statistics, 238 persons (as against 334 in 1907) were kept in prison three months before trial, and then 46 of them were acquitted. There are cases where prisoners have been kept waiting over four months and then acquitted. And the reason for this is that the Judges and the Bar, the local tradesmen, hotel keepers and boarding-house keepers in Assize towns will not give up their interests and profits in the Assizes.'

We have just seen that the Circuit system does not account for all the lengthy detentions ; but that a considerable portion of them may fairly be laid to its charge there is little doubt when we find that at Bedford, for example, the Summer Assizes begin on May 15, and the Autumn Assizes on October 26. At Carmarthen the Summer Assizes begin on May 11, and the Autumn Assizes on November 23. Consequently an accused person may be kept in confinement over five months on one circuit and over six on the other.

There was a great outcry in the English Press some months ago because two Englishmen, accused of being spies, were detained some weeks in a German prison awaiting trial. Here the parable of the mote and the beam has a distinct bearing on our insular self-complacency. Moreover, it is relevant to note that compensation is paid in Germany to an accused person who has been long detained on a charge which has proved to be false.

The simple truth is that in legal matters this is *par excellence* the land of tragi-comedy. On a rare occasion a protest is heard against an abuse which has lasted for centuries together. This means that the great majority of the Judiciary have accepted it as they accepted the old Court of Chancery. And as vested interest in fees

was alleged in explanation of acquiescence in that abuse, so in regard to the Circuit system (and that portion of the detentions for which it is to blame) we find a reputable journal bracketing our highly paid Judges with hotel and boarding-house keepers and local tradesmen in having a pecuniary interest in perpetuating a piece of sheer medievalism ! Without adopting the accusation we may be permitted to call attention to the fact that along the whole line of our Legalism, whether we have regard to its methods of obscurantism or its methods of barbarism there is the haunting suspicion of vested interest.

Compare our Circuit system and all its antiquated paraphernalia with the 375 tribunals of the High Court in France ; with a High Court in Germany for every 250,000 of the population, or with Holland and its twenty-three local High Courts. When we consider the accessibility, cheapness, and promptitude of Justice in those countries we are filled with astonishment at the acquiescence of our judiciary in conditions which make a continued denial of these blessings possible to this nation.

These things have a cumulative effect, and a point is reached where the least captious critic is compelled to ask himself in whose interest is a conspiracy of deception organized in one quarter and a conspiracy of silence in another ? In a hundred artful ways the superiority of English Justice is extolled by our special pleaders in high places and the far-flung line of skirmishers who mislead public opinion—that is the conspiracy of deception. As regards the conspiracy of silence, can our judiciary be held free from complicity in the age-long abuse under consideration ? In such a glaring case we should expect not an occasional protest but a united appeal to the Throne or the nation which would make it impossible that such a shocking scandal could continue another month. What do we see ? What is the explanation ? In whose interest do we perpetuate a condition of things

which is in flagrant opposition at all points to the public welfare ?

In 'The Record of an Adventurous Life,' by Mr. H. M. Hyndman (Macmillan, 1911), p. 406, we read : 'Sir Charles Russell arose in a towering rage, using, as usual with him in such circumstances, the foulest of foul language under his breath, but being most polite and mellifluous in his address to the Judge.'

'When Burleigh was studying law at Gray's Inn, he lost all his furniture and books at the gaming table to one of his friends. He accordingly bored a hole in the wall which separated his chambers from those of his associate, and at midnight bellowed through this passage threats of damnation and calls to repentance in the ears of the victorious gambler, who lay perspiring with fear all night, and refunded his winnings on his knees next day.'—*Lord Macaulay's Essay on 'Burleigh and his Times.'*

This is from 'A Chance Medley': 'The late Mr. Justice Denman used to tell many stories of his professional experience. Once when he was on Circuit at Maidstone he defended a prisoner who was charged with stealing and receiving. At that time both the counts for these two offences could not be included in the same indictment, and so the accused was tried separately on each. In the first case Denman argued that the facts against his client, if they pointed to anything pointed to receiving, and the man was acquitted; whereupon, in the second, he argued that if it was anything it was a case of stealing, with the same result.' It seems that many Judges chuckle over their early successes in thwarting the course of Justice. That habit is the condemnation of our system of recruiting the Bench. A failure of Justice should be a painful spectacle to a Judge—and it is so to a Judge specially trained for judicial functions—not a source of merriment.



## APPENDIX T

Sir Robert Stout, ex-Premier of New Zealand, in an interview published in the *Review of Reviews* for June 1909, made the following statement : —

‘A great Imperial Judicial Tribunal sitting at the capital of the Empire and dispensing Justice to the meanest British subject, even unto the uttermost parts of the earth, is a great and noble ideal. But if the tribunal is unacquainted with the Law it is called upon to administer it may unconsciously become a worker of injustice. If such should unfortunately happen, that Imperial spirit which is the true bond of union among his Majesty’s subjects must be weakened. We in New Zealand are, as far as the Privy Council is concerned, in an unfortunate position. It has shown that it does not know our Statutes, conveyancing terms, or history.’

The following extracts are from an article on ‘Our Judicial System,’ by a Law Reporter, in the *National Review*, for October 1909 :—

‘Speaking of the Judicature Acts the late Lord Esher said that their effect was to introduce into Common Law actions all the complications and intricacies of the old Court of Chancery. . . . We all know how Lord Eldon in the House of Lords used to affirm or reverse or vary his own decisions at Lincoln’s Inn. . . . On one occasion when Bramwell, L.J., was sitting to hear a Chancery appeal he used language to this effect : “As I know nothing of the subject before the Court and am hardly familiar with the technical language to which I have been listening, I can only express my respectful concurrence with the judgments which have been delivered.” . . . “The divisions of jurisdiction are anomalous and absurd as anything else in our administration, or, in other words, as anything can well be. The bankruptcy of a Rothschild

—if such a thing were conceivable—might be carried through before a judicial officer with £1500 or £2000 a year and by solicitors without the aid of counsel ; but, to take an actual instance : if a gentleman says to a third party that a lady has stolen his little dog, a High Court Judge of £5000 a year and learned counsel instructed by solicitors must be employed on the resulting action. *Quid quo ineptius ?* ” . . .

‘The Judges are, it is not too much to say, the spoiled children of the State. After years of overwork at the Bar, the age usually of about fifty-five, they go to the Bench, and if, after a few months’ work, they break down, they receive an enormous pension to which, in any event, they are entitled after fifteen years’ service. Is there any reason in the world why, as with humbler folk, the pension should not be in proportion to the number of years of service ?

‘The Bar opposes any real change. The prosperous minority are too busy and too materialized to care for or devise improvements ; the majority are too depressed or too hopeless to make any attempt.’

In ‘The Reminiscences of a K.C.,’ Mr. Crispe, of the Middle Temple, has many excellent stories of Judges and how to manage them. The inattention, the irrelevance, the feeble brains, the failing powers of many occupants of the Bench must strike the most perfunctory reader. One Judge, for example, had been a railway counsel when at the Bar and he was unable to shake off the habit of hostility to railway claims. ‘To be before Mr. Justice Field in a claim for damages against a railway was not to have the most favourable tribunal.’ So it came about that in railway cases it was necessary to evade his Lordship and have them tried before a Judge who ‘was in our favour from start to finish and gave “us” favourable verdicts.’

Then there was Baron Huddleston, who managed

a jury in this way: 'He would leave his seat, and, approaching the jury-box, point out most affably perhaps some difficulty in a plan or a document; he would flatter, coax and wheedle them; become, in fact, a thirteenth jurymen; and it was almost impossible to get a verdict when his views were the other way.'

'This was another Judge's little oration to the jury: "Well, gentlemen! I do not know what you think, but if you think as I think, I think you will find a verdict for the plaintiff." The foreman of the very common jury responded. "We does, your honour, unanimously."

'Another Judge was fond of interrupting a case by giving a long anecdote with no point in regard to it. One day I was before him and he interposed in this fashion: "When I was a boy I was lost on Banstead Downs. The snow covered the ground. I was wet, weary and hungry. I wandered on, the thick snow blinding me with its drift. When I thought that all was lost, I saw in the distance a flour mill, the sails of which were flapping in the wind. At last I reached the mill, and the miller's daughter——"

'In another case Winch and I were only separated from the Master by his table. Winch was getting angry because the Master seemed to be dreaming. At last Winch got up and placing his hand on the table said something in a loud tone. "Dear me," said the Master, "what a nice hand you have, Mr. Winch." I expect at the time Master Gordon was failing, as I always had an excellent account of his ability.'

The following letter appeared in *The Times* during November 1909. It is characteristic of the legal profession that we never get such evidence until long years have passed. This letter is not wanting in frankness, but it refers to events of thirty years ago. The writer says:—

'Sir,—In giving on November 13th the counter arguments against the increase in the number of Judges, you have omitted one, to my mind, of great force. I refer to the extreme age of the occupants of the Bench. When I

went circuit in the seventies I followed three Judges whose continuance on the Bench was a scandal. The first had almost entirely lost his voice, and, being a most punctilious man, he summed up cases occasionally taking hours, while the jury were unable to catch a single sentence.

‘The second, though in private life a most amiable man, was so tetchy that the most experienced counsel confessed their inability to know how to treat him. Those two Judges, when appointed, were over 70 years of age.

‘The third Judge was physically vigorous and not advanced in life, but he was exceedingly deaf, so that his summing up in a criminal case was constantly interrupted by counsel for prosecution or defence, because the Judge quoted from his notes remarks which the witnesses had never made.

‘One of your contemporaries complains that the decisions of some of the Judges are so erratic as to make “appearance before them a mere matter of speculation.” This is a defect, I am afraid, in its nature incurable, and is common to all appointments. You can never be sure how a man will turn out as Bishop, or Judge, or Chief Constable. But you can be sure that at 70 the average human being is too old effectively to carry out the duties of an English Judge.’ The letter is signed ‘An Elderly Barrister.’

It is extremely probable that nothing was heard at the time of the scandals mentioned in this letter. Is it possible that there are at present on the Bench Judges long past the plenitude of their powers and a terrible drag on their colleagues ?

The last sentences of ‘An Elderly Barrister’s’ letter are remarkable as an instance of fallacious reasoning. It is not a fact that the newly appointed Bishop or the newly promoted Chief Constable are as uncertain a quantity as a newly appointed Judge ; for the reason that the two former have been accustomed to perform duties of the

same kind as those appertaining to their position. The Judge, on the contrary, is expected to cast behind him the ingrained habits of half a lifetime. 'He has represented or misrepresented the views of the Law according to the side he was on.' His allegiance has been, chiefly, to the letter of the Law ; but on promotion to the Bench we call upon him to transfer that allegiance to the spirit. We expect the impossible. Our habits are not put off like our garments ; they become part of our intellectual and physical equipment. There is therefore no analogy whatsoever between the cases which have been carelessly bracketed together ; the new Judge is an incomparably more uncertain quantity than either of the other promotions, while his duties are infinitely more important.

But that is not all. Should Bishop or Chief Constable prove grossly incompetent through failure of intellect, hearing, or vision, the resources of civilization will assuredly be equal to the occasion and he will be invited to resign. Not so in the case of the Judge. A quite special degree of sacro-sanctity encompasses him about. Despite the inflictions on client and barristers ; despite increasing infirmities and the most favourable retiring rules in the world, he sticks like a limpet to the Bench and nothing is heard of the scandal outside legal circles until another Barrister writes his reminiscences thirty years hence.

Sir Robert Stout, ex-Premier of New Zealand, was quoted above as expressing the profound dissatisfaction of the Colony with the decisions of the Judicial Committee of the Privy Council. The judgment to which attention is now called suggests that not New Zealand alone has reason to complain that 'the tribunal does not know the Law,' or, let us say the well-established business usages 'in the Colony whose laws it is called upon to administer.'

On December 27, 1909, judgment was given on an

appeal from a decision of the Supreme Court of Hongkong of July 24, 1908. The plaintiff in the action is a Chinese merchant who paid \$40,000 into the Russo-Chinese Bank in Hongkong on January 3, 1907, in order to have it remitted by telegraph to Shanghai. The Bank's senior Chinese employee, known as the 'compradore,' received the money and gave the merchant the Bank's receipt—but failed to remit or return the money. The merchant sued the Bank in Hongkong and got judgment. The Bank moved the Supreme Court to have the judgment set aside. On July 24, 1908, the Supreme Court dismissed the appellant's motion with costs.

The Judicial Committee of the Privy Council has now reversed the judgment of the Supreme Court, with the result that the unfortunate merchant has had to fight three actions at great expense, thus enormously increasing his original loss of \$40,000. This judgment has been much discussed in Anglo-Chinese business circles in London. It is declared to be due to an absolute misconception of the position of 'compradore' in the business of the China coast.

A merchant of many years' experience in China expresses the greatest surprise that the Bank should fight such an action or that the Judicial Committee should drag in a string of home technicalities to confuse a perfectly simple issue.

Transferring a sum of money by telegraph from town to town is an everyday banking operation. It neither calls for special treatment nor special reference to the manager. In delivering judgment Lord Macnaghten said: 'For the purpose of doing business with Chinese customers there was established a department in the defendants' Bank at Hongkong managed by a Chinese official styled a "compradore" with the aid of two Chinese cashiers and an assistant, also officials of that Bank and in its employ. The powers, duties, and obligations of the "compradore" were enumerated and described in great

detail in an indenture entered into by him with the Bank for the purpose of giving security to his employers for the faithful discharge of his duties.'

This is the place to mention a fact which is perfectly well known in China, that all banks hold, as security for the honesty of their 'compradores,' sums compared with which \$40,000 are a mere trifle. Consequently when a 'compradore' fails to account for money, as was the case here, the Bank has a short way of setting the matter to rights, as the Judge and Jury on the spot knew perfectly well. No one can doubt that they did substantial justice in the case. The Judicial Committee has now permitted the Bank to sail off under cover of the following transparent technicality -- one of our Byzantinisms; it is called the law 'of holding out.' On this 'principle' there is a mass of authorities, subtleties and super-refinements as to the position of agent and principal. This orgy of Legalism so hypnotized the august tribunal that it set aside Mr. Duke's argument, which will appeal to all business men as the words of truth and soberness. 'In dealings such as those which took place in this case with the Chinese customers of the Bank, the "compradore" is the "*alter ego*" of the Manager; and that as the plaintiff's money had admittedly been handed to him and the receipt of it been acknowledged by the proper Bank official in the "compradore" department, it must be taken to have been received by the Bank, was now held by them, and should now be returned to the plaintiff.'

Astounding to relate, their Lordships held that that contention could not be sustained. Because, forsooth, authorities--which had nothing whatever to do with Chinese business--cited on the other side gave colour to the contention that the 'compradore' had exceeded his powers. He had 'held himself out' as having powers he did not really possess under his indenture. And so the innocent client must stand the loss of his original payment and the cost of three lawsuits!

‘Is it possible’ asks *The Times* of March 22, 1910, ‘for a decision of the House of Lords, while final and conclusive in law, to be open to criticism and question before the tribunal of common sense? Or, to put the same point differently, is it possible for a Court, properly anxious to extend the benefit of a measure of relief, gradually and imperceptibly to expand its meaning until at the close of the development the statute comprehends cases which no one would have originally supposed were within it?’ . . .

‘These questions are prompted by some recent decisions of the House of Lords, and particularly by that given the other day in *Clover, Clayden & Co. v. Hughes*, with reference to the meaning of “injury by accident” in the “Workmen’s Compensation Act.”

‘A correspondent in our columns has recently pointed out that this last decision may have far-reaching consequences; and it is certainly well that employers should know to what they stand committed. The course of evolution of decisions is instructive. It illustrates a process known to theologians and by no means unknown in Law.

‘We mention first a decision which has been the parent of others and may be prolific in further strange results.

‘A workman was engaged in handling a machine described as a combination of a kettle and a press. He had to move a lever and turn a wheel. The wheel did not revolve so easily as usual. And it was found that he who was of ordinary health and strength was ruptured. There was no evidence of any wrench or slip or jerk. The man was engaged in his ordinary work. He was doing just what he intended to do. No outside force intervened.

‘The Judges before whom the point came were of opinion that the injury was the result of an “accident” within the meaning of the statute. The late Lord Robertson, who never suffered from the infirmity of doubt,



going so far as to say that "no one out of a Court of law would hesitate to say that this man met with an accident."

'Then came a further remarkable development. A trimmer on an ocean-going steamer was in a very bad state of health, his constitution being shattered when he shipped; he suffered from heat emitted from the boilers and died therefrom. It was not suggested that anything abnormal happened. There was no proof that a person of ordinary strength would have been injured in like circumstances. He came on board half starved. He was physically miserable, undersized and under fed, and so emaciated that, as one of the witnesses said, his bones projected. The heat was not excessive; the ventilation was perfect; the conditions under which he worked were normal. Yet the House of Lords held that the deceased died from an "accident." The earlier decision prompted and justified an advance along the same lines.

"That case," said the Lord Chancellor, referring to the decision we have mentioned, "stands as an authority, and I would not depart from it if I could." And he proceeded to hold with a majority of their Lordships that the case of the trimmer was within the terms of the statute.

'Lord Macnaghten dissented. "The death," he said in words which will recommend themselves to most persons, "was due to the physical state of the workman and the nature of the employment, to state the language of section 8 and sub-section 6. It was just what anyone would have expected who saw the man and knew what a trimmer had to do."

'The House of Lords went a long way in another case, in which it appeared that a workman engaged in sorting wool in a factory caught the disease known as anthrax and died of it. . . . No doubt, as the Lord Chancellor has more than once said, there is a danger of defeating the intention of the legislature by introducing subtleties. The Act is

not to be construed by schoolmen or metaphysicians. . . . There seems something amiss with decisions that a workman standing by an open hatchway who is seized with an apoplectic fit, and who falls into the hold, is within the terms of the Act. . . . Not the least striking remarks in Lord Shaw's weighty and impressive judgment are those in which he pointed out that the effect of this liability might be to make employment for a class, often the most needy and deserving, more difficult to obtain than it has been.'

The truth is that the training of our Judges is such that it delivers them bound hand and foot into the power of the first plausible subtlety which the advocate advances. Only really great Judges in the past or the present have withstood the force of habit acquired in advancing similar subtleties during the best years of their lives.

*The Times* Parliamentary report, April 21, 1910 : ' Mr. Markham said " it was ridiculous for the Government to ask for the appointment of additional Judges considering the time the present Judges worked. There were only 313 working days in the year, and out of that the Judges took 119 days for holidays. That was grossly out of proportion to what any business man in the country took (Hear, hear). If the Judges took the same length of holiday as other citizens in the State, there are plenty of them to do the work. Owing to the fact that there are 150 lawyers in the House, special privileges were accorded to these ' weary Willies.' "

' Mr. Watt moved to insert in Clause 1 a provision that " the Judges so appointed shall not be more than 55 years of age at the time of their appointment. " He pointed out if this were agreed to, the Judges would be entitled to pensions on retiring at 70, as in another amendment he would propose that they should be bound to do. He thought it would be admitted that the Judges in this country were too old. At least one half their number had attained the Biblical maximum of three score years

and ten ; and in Scotland the ages of several of the Judges exceeded 80 years. An age limit for Judges was more important than for civil servants, for if the civil servant slept at his desk no one was much the worse."

'The Attorney-General said. If he were called upon he would be prepared to give instances proving that the most effective, the most vigilant and the most acute Judges would be found not among the youngest but almost invariably among the oldest men.'

And so the special pleader invites us to believe that not only the laws of this country but those of Nature place the legal caste in a specially favoured category. Judges, like port, improve with age. The older the better. The ideal Judge is the man who has lost the use of all his senses except an ear trumpet.

In a discussion on the Supreme Court of Judicature Bill in the House of Commons on July 5, 1910, Mr. Martin (St. Pancras, E.) said.

'The most important objection to the present system in the High Courts was not that the Judges did not as a rule sit on Saturdays, but that they had over four months' holiday every year ; and no undertaking was given by the Prime Minister that those holidays would be curtailed. It appeared that the long holidays of the High Court were really for the convenience of the leaders of the Bar who had more work than they could do. Why should Justice be tied up for four months to allow members of the Bar to take a long holiday ? In his opinion the Courts of Justice should sit each day throughout the year, just as the various departments of the State worked daily, and yet their officials had regular holidays.'

In *The Times* of July 8th, 1910, 'Mentor' writes as follows. The letter is given leading type under the heading 'Judges as Directors and Trustees of Public Companies': 'On this day last year you published a letter from me

on this subject in which I ventured to point out how undesirable it is for Judges to be either directors or trustees of public companies, and I also drew attention to the way in which the names of Judges were extensively advertised in order to promote the interests of certain companies.

‘Since the disastrous and deplorable failure of the Law Guarantee Trust and Accident Society some of the shareholders have stated that they were influenced in buying shares not only by the high professional standing of the solicitors who were the directors but also on account of the fact that two well-known Judges were the trustees. A Judge’s salary is £5000 a year, and he is allowed for his expenses on Circuit the liberal sum of £7 10s. a day, so that it can hardly be necessary for him to augment his income by director’s or trustee’s fees.

‘The great dignity and high position of the Judges will, I am sure, be better maintained if they cease to act as directors or trustees of public companies, unlimited or limited, and the objection to their acting in either of these capacities is not removed by the statement that the companies are in a sound and flourishing condition.’

In a debate on the Judicature Bill in the House of Commons on July 16, 1910, Mr. Watt (Glasgow College) said he moved the rejection of the Bill on the ground that no limit of age was required of the proposed new Judges. So far as he was concerned the Bench was in an unsatisfactory condition, and, to put it mildly, many of the Judges were past their best; it was a well-known fact that the somnolency of the Bench interfered on many occasions with the administration of Justice. Of the sixteen Judges of the King’s Bench, four were over 70; one being 77; one 75 and seven over 65.

In the same debate Sir Edward Carson said: ‘He was opposed to fixing an age limit, which would probably

sometime, exclude the most suitable men. For instance, an age limit which deprived them of the services of the late Lord Chancellor would deprive them of an inestimable advantage.'

One swallow does make a summer in the legal domain ! And so a rule that is found necessary in every other service in the world is considered inapplicable to Judges in spite of the fact that the inefficiency of certain occupants of the Bench—owing to the infirmities of age—has been constantly a subject of remark and occasionally a grave scandal. The simple truth is that Judges, almost without exception, have devoted their best years to the Bar. They give their declining years to the Bench. This is part of the price we pay for our devotion to the cult of advocacy. It must not be forgotten that when our special pleaders oppose the age limit for Judges their utterances are subject to the usual discount ; that is, they must never be taken to mean what they say. The real opposition is due to the fact that as the Bar is wedded to trial by jury— an inefficient, expensive, and uncertain survival, but the palladium of the Bar— so the advocate is opposed to an efficient Bench for precisely the same reason. The interest of the Bar is subserved by every species of legal inefficiency. Trials are prolonged ; appeals are multiplied ; reversals are more frequent ; heavier tribute is levied on the public by inefficient than by efficient Judges. It is well to remember the true inwardness of these relations when Bar and Bench fall on each other's necks in after-dinner expansion.

In the *Sunday Times* of July 31, 1910, a barrister writes : 'The anomalous constitution of the House of Lords as a Court of Appeal was curiously and unexpectedly illustrated on Monday. In its judicial capacity the House is really a Committee of the legislative body. Its terms are parliamentary ; its judgments " speeches " ; in reference either word is appropriate and usual ; they are

addressed to "my lords." Since Daniel O'Connell's famous and successful appeal some sixty years ago, the administration of the law has been left in the hands of Judges ; but there is even under the Appellate Jurisdiction Acts of 1876 and 1887, no positive exclusion of laymen ; and in the Bradlaugh appeal of nearly thirty years ago the late Lord Denman purported to give a vote which, however, was not recorded. On Monday their Lordships pronounced their decision in an important moneylending appeal. But there were only two Lords present—the Lord Chancellor and Lord James. The Bishop of Bristol, as chaplain, happened to be present and made up the quorum of three required by the Appellate Jurisdiction Acts. Such an event appears in recent times to be unprecedented. The question was discussed a few years ago before a Committee for privileges. . . . On that occasion Lord Spencer, who is now seventy-five, made an interesting speech in which he stated that, as a very young peer, he was once captured by the Lord Chancellor to make up a quorum for the hearing of an appeal.'

Observe that from the magistracy to the House of Lords, and at each intervening stage, the same happy-go-lucky, haphazard want of method prevails. Any makeshift is resorted to ; anyone is good enough for what all other civilized communities deem the most important of all duties.

A detail in those appeals to the House of Lords is worth mentioning ; it shows that whereas there may be a fortuitous concourse of Judges to form a Bench there is no want of system in making up the cost. It is ordained that all pleadings, every document relating to a case must be, not only printed, but bound—thoroughly well bound. Moreover, the mode of printing is meticulously prescribed, so that a 'meagre rivulet of print must meander through a meadow of margin.' With the result that the printer's bill in famous cases has been known to reach a sum approaching the entire cost of an appeal to the

highest Court in France or Germany. This is worse than Byzantinism ; it is *Chinoiserie* of which China herself has become impatient.

This is from Ralph Waldo Emerson : ‘ We had a Judge in Massachusetts who at sixty proposed to resign, alleging that he perceived a certain decay in his faculties ; he was dissuaded by his friends, on account of the public convenience at that time. At seventy it was hinted to him that it was time to retire ; but he now replied, that he thought his judgment as robust and all his faculties as good as ever they were.’

This extract is from the Report on Law of the Select Committee of the House of Commons, 1810 : ‘ Your Committee also proceeded to examine into all the fees and emoluments taken by the Lord High Chancellor in his jurisdiction as Chancellor as well as from Commissions in Bankruptcy, and the evidence of Mr. Pensam distinctly shows the annual amounts of the emoluments for the last nine years exclusive of those which arise to the Lord Chancellor in his capacity as Speaker of the House of Lords.

‘ It will be found that from April 14 1801 to 5th April, 1802, the amount was £9,926 12s. 7d., steadily rising until 1810 when the amount was £15,532 13s. A considerable part of the emoluments of the office of Lord Chancellor is, as your Committee understand has been the case for a very long course of years, derived from fees nominally paid to the Secretary of Bankrupts, but who accounts for such fees to the Lord Chancellor himself and is allowed by the Lord Chancellor a certain fixed salary, in lieu of such nominal fees. Your Committee cannot see this without observing that it appears to them highly inexpedient that the emoluments of any judicial officer should be constituted in part of fees not ostensibly paid to himself but to an inferior officer. If more than the proper fees

should be alleged to have been taken by the ministerial officer, the complaint must be made to his superior, the Judge of the Court, who would in such cases have to sit in judgment upon such alleged abuses from which if they existed he would himself derive a benefit. If it should be thought that any alteration should be made in this respect and if the salary and other emoluments of the Lord Chancellor exclusively of such fees should be deemed insufficient for the office, your Committee would suggest the propriety of increasing the salary and abolishing altogether the fees in question which, though they do not appear to be great in amount in each Commission, yet can be considered in no other light than as a tax on distress and insolvency.'

That was just over a century ago. It is evident that the present salaries of our Judges were fixed by a process of commuting the sums which they formerly received as salary and as Court fees. Which is another way of saying that it is the recognition and perpetuation of a vicious system. The trail of corruption is over those emoluments. There is not a shadow of justification for their continuance on the present lavish scale. We cannot possibly come into line with our neighbours and appoint Judges in equal numbers with those found in France, Germany and Holland—the figures were given by Lord Gorell in the House of Lords—if we continue to pay our Judges between four and five times what their colleagues on the Continent receive.

Here we encounter the special pleader who urges that there are exceptional reasons in this country which more than justify exceptionally high remuneration. These are found in the large incomes which barristers forego on accepting promotion to the Bench. But there is a still stronger argument arising out of the exceptional nature of the duties of the English Judge. His responsibility is incomparably greater than that of the continental Judge, who hardly ever sits alone. That is the prevailing



condition in this country, hence the justification for enhanced remuneration.

If we examine these arguments we shall find that they are broken reeds which pierce the hand leaning on them for support.

The first argument begs the question. It attempts to defend one abuse by taking the continuance of another for granted. We shall not always go to the Bar for our Judges. But supposing we do so for some years to come there is no justification for the present scale of salaries paid to Judges. The maximum income earned at the Bar by some of the Judges affords not the slightest warrant for the present scale. Moreover, when we consider cases in which a very large income has been earned, there is a material distinction between an income that is precarious and one that is certain together with a liberal pension and retirement rules more favourable than any service in the world can show.

The argument from the heavier responsibility of English Judges compared with their continental brethren has an appearance of validity at the first glance. It is true that our Judges generally sit alone. But it is conveniently forgotten that in an immense majority of cases there is a jury on whom no inconsiderable portion of the responsibility devolves. Our neighbours having abolished juries in civil causes have found that the public interest is served by a Bench of two or three Judges instead of a single Judge and jury. The extraordinarily small number of reversals on the continental system established its superiority beyond dispute, that is if the public welfare and not that of the Bar is the object in view. It appears, then, that in one case the responsibility of the Judge is divided with a jury and in the other with colleagues on the Bench. So it cannot be maintained that there is a disproportionate degree of responsibility devolving upon the English Judge. But there are other circumstances which immensely lighten his load. He enjoys a stretch

of latitude, he becomes a species of free lance to an extent that is unimagined by continental Judges, whose every decision is the object of the closest scrutiny by the department of Justice. This unceasing attention to decisions is not only desirable inasmuch as it tends to discourage eccentricities, but it serves to provide remedies for defects which the Judges point out. Having regard to the paucity of reversals, the certainty and cheapness of Justice among our neighbours, there is no resisting the conviction that our scale of salaries for Judges, from whatever point of view it may be regarded, finds not the smallest justification for being so greatly in excess of what is paid on the Continent.

In *The Times* of December 20, 1910, there is a report of the famous case, 'Rex v. Ball and Another,' in the second hearing before the Court of Criminal Appeal, the Lord Chief Justice and Justices Pickford and Avory on the Bench; counsel for the prosecution said this Court quashed the conviction in this case a short time ago and on Thursday last the House of Lords made an order reversing that order. The House of Lords had no machinery for enforcing the order, and it was therefore necessary to come back to this Court for an order to enforce it.

'In giving judgment the Lord Chief Justice said: "The appeal from this Court to the House of Lords was successful, and the order of the House of Lords was that the order of this Court should be reversed; and the natural consequence was that the conviction, if he might use the expression, was re-established."

'We are familiar with the dictum that "No one knows what the Law is until a case has been tried in Court."

'The question is whether the Judges themselves know what the Law is even after a case has been tried and re-tried.'

In the report of the Divorce Commission in the Press of December 22, 1910, we read under the heading 'Mr. W. T. Stead's Evidence': 'The witness in reply to questions said he was surprised to hear the suggestion for relieving editors of their responsibility to the public and giving it to the Judges. He had no faith in Judges; they might be good or bad. The witness mentioned two names to illustrate his remark.

'The Chairman: Do not you think you had better leave out names?'

'Mr. Stead: You can bowdlerize my evidence as much as you like.'

'The Chairman: That is a most improper remark.'

In *The Times* we read, among the chief proposals to be submitted to the Conference by the Government of New Zealand there occurs the following: 'That no Imperial Court of Appeal can be satisfactory that does not include judicial representatives of the oversea dominions. That there should be more uniformity throughout the Empire in the Law of Copyright, Patents, Trade Marks, Companies, Accident Compensation, Naturalization, Immigration, Aliens' Exclusion, Currency and Coinage.'

Our legal equipment costs nearly as much as those of any two countries put together, but it does not include an organized Department of Justice! Our inefficiency in Imperial matters is on a par with the delay, confusion, uncertainty and expense in the home administration.

There was much fluttering of the legal doves in the spring of the year 1911. The Barrister-Premier had been constrained to administer a grave rebuke to a Judge. In a leading article on the subject in *The Times*, of February 9, there is this significant passage: 'We could name Judges who, it was freely said, shone as advocates on the Bench more than at the Bar; who could not always forget that they had been party men;

and who, to the last, showed when a chance presented itself, that they had been faithful to their first love; politics.'

In that sentence the leading journal has pronounced judgment on our method of recruiting the Bench. In four lines that judgment disposes of volumes of interested special pleading; of oceans of rhetoric and floods of after-dinner oratory in which the idyllic relations of Bench and Bar—and more especially the perfection of the Bench as a product of the Bar—are displayed as a challenge to the admiration of the world.

Is it too much to expect that the leading journal having ruthlessly exposed the feet of clay, will have the courage of its opinions and demand the organization of a Department of Justice and a Judiciary separate from and independent of the Bar, in substitution for the discredited, medieval simulacra with which we are at present afflicted?

Telegraphing from Athens on February 9, 1911, *The Times* correspondent says: 'The Minister of Justice laid before the House a series of bills radically modifying the law relating to the administration of Justice, which leaves much to be desired. The measures proposed tend to restrict the opportunities for delaying judgment indefinitely by the resort to legal quibbles. The accomplishment of these important reforms will undoubtedly give new life to business and will contribute greatly to the economic development of the country.'

Legal quibbles are being discredited in the home of dialectics! The casuistry of the West, both theological and legal, is Jewish and Greek in its origin. Our legal casuistry is a *damnosa hæreditas* which came hither by way of Rome and our ecclesiastical Bench after the Norman Conquest.

Replying to a deputation from the Trade Union

Congress Parliamentary Committee on March 14, 1911, Mr. Churchill, M.P., said : ' He was not going to mention names or cases, but it was true that on several occasions statements had been made from the Bench reflecting on Trade Unions in language which was extremely ignorant and out of touch with the general development of modern thought and which had greatly complicated the administration of Justice and added bitterness and a sense of distrust to the administration of the law. That was greatly to be regretted.'

In Mr. Charles Dawbarn's ' France and the French,' we read :

' The best paid French Judge gets not more than £1200 : the salary of the First President of the Court of Cassation. His colleagues who preside over each chamber of the Court receive £1000, which is also the stipend of the First President of the Court of Appeal. It is only necessary to compare these figures with the salaries of the judiciary in England to be aware of the disparity of treatment of the two bodies. In England the Stipendiary of a Police Court obtains as large a remuneration as the highest judicial talent in France. There is no Lord Chief Justice, as in the English system, drawing his £8000 a year—a figure somewhat out of proportion perhaps with the necessities of the case—and the Lord Chancellor is merely the Minister of Justice drawing the ordinary Cabinet pay of 60,000 francs.'

The following extract is from ' Labour Legislation, Labour Movements, and Labour Leaders,' by George Howell (1905), vol. ii. p. 62:—

' *Prosecution of Dorchester Labourers.*—The story of this prosecution and its results is one of the most disgraceful in the history of prosecution. In 1831–2 there was a general movement among the working classes for an advance in wages in which even the downtrodden agricultural labourers took part. The labourers of Tolpuddle

solicited an advance and met their employers to negotiate. The latter agreed to concede the same rates as were paid by other farmers in the district. With this promise the men returned to their work. . . . But the promise was not kept. The employers refused to give more than 9 shillings per week, though other farmers in the neighbourhood gave 10. . . . In the following year, 1833, these employers of Tolpudde reduced the wages to 8 shillings per week.

*'Labourers' Wages and Justices of the Peace.*—The reduction in wages caused great dissatisfaction and the whole of the labouring men in the village, except two or three invalids, applied to a resident magistrate, W. M. Pitt, Esq., for his advice. The men were evidently under the impression that the Justices had still the power to fix wages. Mr. Pitt asked the men to appoint a deputation of two or three, and come to the County Hall on the following Saturday and he would apprise the chief local Justice, James Frampton, Esq., and request the employers to come also to settle the matter. The deputation waited upon the Justices as suggested. The magistrate told the men that they must work for what wages the masters thought fit to give them, as there was no law to compel masters to give any fixed rate. The men remonstrated, and called upon the clergyman of the parish (Dr. Warren) as witness of the agreement previously entered into. This ornament of the Church had pledged himself to see them righted, but he, like the farmers alluded to, repudiated his promise.

*'Formation of a Union.*—The men continued working, but they were embittered by reason of broken promises and injustice. The wages were further reduced to 7s. per week and they were told that a further reduction to 6s. would follow. Then it was that the men tried to form a trade union, some of them having heard of such organizations. In October, 1833, two delegates of a trade union visited the village and a union was formed.

Members of trade unions at that date, like members of the old guilds, of friendly societies, of Freemasons, Orangemen and others, formulated an oath of fidelity, nothing treasonable in it—a simple declaration on oath, to abide by the rules, not to divulge the business and to be faithful to each other.

*‘ Treachery : the Common Informer.* —On December 9th, 1833, a “ common informer,” one Edward Legg, attended a lodge meeting and asked to be admitted as a member. George Loveless, who wrote the whole story in 1837, states that he had no knowledge as to how or by whom Edward Legg was introduced. On February 21st, 1834, a kind of proclamation, or placard, was issued by the magistrates and posted up in conspicuous places, cautioning men as to combinations, and threatening them with seven years’ transportation if they joined the union. George Loveless obtained a copy and read it. He says, “ This was the first time that I had heard of any law being in existence to forbid such societies.” This notice issued by the Justices, was eight years after the Combination Laws had been repealed, was, in fact, an illegal act : there was no law in force forbidding such societies.

*‘ Arrest of Loveless and others.* —On February 24th, as George Loveless was going to work in the early morning, the parish constable met him and said, ‘ I have a warrant for you from the magistrates.’ Loveless asked its nature ; the constable gave it him to read. . . . His five companions had been similarly apprehended, and all of them, with the constable and another, tramped seven miles to Dorchester, where James Frampton and one other Justice received them. . . . They were remanded. . . . On entering the prison they were searched, stripped, their heads shorn (the prison crop) and kept in confinement till the following Saturday—five days.

*‘ Means employed to Ensure Conviction.* —On March 1st they were brought before the bench of magistrates, Legg again being the sole witness, when they were committed

for trial. They were tried on March 15th, at the County Hall, when another witness was produced by the name of Look. Efforts were made by lawyers, Justices, parsons; and others to induce some one or more of those six men to give evidence against the others. They one and all refused though freedom was offered as a reward. The evidence was absolutely *nil* except on one point. The witnesses swore that the men took an oath. This they did not deny. But the oath they took not only bound them together in a bond of fraternity but also bound them not to violate the law. In any case the law as to unlawful oaths, in the Combination Laws and other enactments relating to labour, had been repealed. They were not re-enacted in the 6 Geo. IV., c. 129. But conviction was desired and intended. Every page in the lives of these men was ransacked in order to discover something to their disadvantage. The search failed. Even their employers had to admit that they were honest, sober, industrious men. They had indeed been guilty of one grave offence which told against them. They were Methodists. . . . Yes, conviction was essential.

*'Judge and Prisoners compared.'*—In order to ensure conviction the Act of 37 Geo. III., c. 123, was called into requisition. This was an Act passed in 1796–7 for the suppression of mutiny among marines and seamen, caused by the mutiny of the *Nore*. Under the provisions of that Act the men were convicted. The Judge—Baron John Williams, then recently appointed—is reported to have said: “If such societies were allowed to exist, it would ruin masters, cause stagnation in trade, destroy property, and if they (the jury) should not find the prisoners guilty, he was certain they would forfeit the opinion of the grand jury.” A verdict of guilty was returned. How indeed could it be otherwise? The grand jury were landowners; the petty jury land renters. The prisoners, asked if they had anything to say, Lawless on behalf of all, repudiated any unlawful intention. He said: “We



have injured no man's reputation, character, person or property; we were uniting together to preserve ourselves, our wives, and our children from utter degradation and starvation. We challenge any man, or number of men, to prove that we have acted or intended to act different from the above statement." This was the dignified reply. As the Judge was about to pronounce sentence, one of the counsel rose and protested. He declared that not one of the charges brought against the prisoners at the bar had been proved, that a great number of persons were dissatisfied, adding that he himself was one of them.

*'The Judge and his Sentence.*—Two days later they were again placed at the bar to receive sentence. The learned Judge told them that "not for anything that they had done, or intended to do, but as an example to others, he considered it his duty to pass the sentence of seven years' transportation across his Majesty's high seas, upon each and every one, of the prisoners." Execration is the only suitable word to apply to Judge and sentence.

*'Treatment of the Prisoners.*—The prisoners were handcuffed and guarded back to prison. Loveless was taken ill in his dungeon and was carried to the hospital. His companions were hurried off to the hulks at Portsmouth. . . . The scandalous prosecution of the six Dorchester labourers and the atrocious sentence passed upon them evoked a storm of indignation throughout the land. . . . The Government was obdurate, and even Lord Brougham supported Lord Melbourne in his attitude of resistance to appeals for mercy. . . . *'The Times* expressed delight with the sentence when passed because of "the criminal and fearful spirit of combination which had seized, like a pestilence, on the working classes of the country. . . ."

*'Treatment of the Men "Reprieved."*— . . . The men had been hurried out of the country to Hobart Town, Van Dieman's Land. Some were put to work with the chain-gangs on the roads, others on the Government

farm. At the end of 1835 George Loveless had an offer from the Government to send for his wife to settle in the Colony—no mention of a pardon or release being made. Loveless refused to send for his wife and children as long as he was a prisoner. At last, however, he consented. He wrote on January 27th, 1836. On February 5th, he was sent for by the superintendent of police, when he was informed that, by order of his Majesty's Government he was to be "exempted" from Government labour, and that he was to employ himself to his own advantage till further orders." . . . Hammett, another of the Dorchester labourers, was sold like a slave for £1. The convicts' names were written on slips of paper, the agents drew lots, each man at £1 per head. Hammett being drawn, the agent gave him the name of his master, and sent him on his way, four hundred miles, with provisions for twenty-two days to carry on his back, sleep where he could and enquire his way as he went along.'

Presumably Baron Williams—worthy successor of Scroggs and Jeffreys—is one of the Popes whose decisions are cited.

In a famous passage Victor Hugo conjures up a picture of the medieval dungeon and the horrors enacted therein. 'Then,' he adds 'in the fullness of time there appeared over against the dungeon a figure, stern, fateful, menacing. It is the guillotine. "Look at me well," it said to the dungeon, "I am your daughter." It has been plausibly maintained that all transgressions are avenged in this world. Is the coal strike of 1912 the child of the crime of 1833? The supreme excellence of English Justice is assuredly the most baseless of all legends. And yet our raw materials of a Judiciary are the best in the world.

A Judge who died in the early portion of the year 1912 once began a political speech in reply to certain complaints of the administration of the Law in the following words from the Ecclesiastical Polity :—

‘He that goeth about to persuade the multitudes that they are not so well governed as they ought to be shall never want attentive and favourable hearers, because they know the manifold defects whereunto every kind of regiment is subject, but the secret lets and difficulties which in public proceedings are innumerable and inevitable they have not ordinarily the judgment to consider.’

Such pompous platitudes will no doubt be extensively cited when the public demand that they shall not always be at a disadvantage with regard to their neighbours in legal matters. All those objections are subject to the interpretation referred to in the text : that is to say they mean, taking them generally, the exact opposite of what they say.

In *The Times* report of November 15, 1911, under the heading ‘An Unusual Trial,’ there is an account of a case before the Court of Criminal Appeal. Mr. Justice Darling in giving judgment said : ‘They had carefully read the papers, and it seemed to them that Mr. Commissioner Rentoul had tried the case in a very unusual and extraordinary way. There were discussions between him and the applicant of which it was difficult to make head or tail, discussions dealing with philosophy, morality, and law. The applicant was tried in a way which they hoped would not be repeated.’

A remarkable case is reported in *The Times*, of December 3, 1909. It is an appeal heard before the Court of Criminal Appeal against a sentence of three years’ penal servitude for obtaining a pony and trap by false pretences. The sentence was quashed because the prosecutor proved too much. The following passage occurs in the judgment :

‘The substance of the charge was that this was a fraudulent transaction. Under the circumstances he (Mr. Justice Channell) should have thought the evidence was amply sufficient to enable the prosecution to ask the jury to convict without calling further evidence. But

the prosecution proceeded to prove other offences. They called evidence of two or three other transactions of getting oats and other provender by giving a false address at which there were stables, and other particulars calculated to inspire confidence. The question is whether these instances came within the authority of those cases where evidence of other offences was held to be admissible. That question had been before the Court and Judges of Assize many times and was not very easy to deal with.'

How easy it would have been if regard for the demands of Justice were the main consideration rather than pedantic respect for technicality! A man whom the Judge did not hesitate to characterize as a swindler would have had his deserts instead of going scot-free. Technicality was 'the organ and safeguard of his liberty.'

'If ever there was an unjust Law in a civilized country, it is the present state of the Law as regards the bites of dogs,' said Judge Emden at Lambeth on January 28, 1910. He found the plaintiff had been ferociously bitten by the dog, but held there was not sufficient evidence to show that defendant knew the animal was ferocious. If anything could illustrate the grossly unfair state of the Law, he added, it was that case.

It must be obvious to our readers that Legalism's purposes are served by the imperfections of Law; consequently the organization of a permanent staff whose duty should be to remove by legislation the hundred-and-one absurdities which disfigure our legal chaos was not to be expected. That course would have diminished litigation. The methods of Legalism, one and all, tend to promote litigation.

An interesting case of a conviction being quashed by the Court of Criminal Appeal is reported in *The Times*, of February 5, 1910. The appellant had been convicted of larceny at the Bucks Quarter Sessions of January 3rd last and had been sentenced to 12 months' hard labour.

He kept a small establishment for breeding pheasants. One evening in December the police watched his premises and saw him go out about 3 A.M. Three hours later they saw him return with a sack on his back. He was seized and the sack was found to contain eleven tame pheasants.

At the trial it was maintained, on one hand, that the charge of larceny failed because, after painstaking inquiries, no one could be found who had lost any pheasants. The police urged, on the other hand, that people might lose some of their birds and not be aware of it.

In support of the conviction emphasis was laid on the suspicious circumstance that a man should bring a sackful of pheasants home in the dark, and it was pointed out that a conviction could stand even if the true owner could not be traced. The appellant gave explanations which the jury disbelieved.

Mr. Justice Darling said that 'if there was really no evidence of stealing it was the duty of the Judge to withdraw the case from the jury on the prisoner's counsel's submission that there was no such evidence when the prosecution closed their case. The appellant's counsel made that submission in the Court below, and as the appellant had a right to a decision at that moment, this Court would now ignore anything that took place during the remainder of the trial after that submission had been made.'

We wonder how many people outside the legal profession will agree with this judgment.

'I have seen a large number of prisoners discharged about whose guilt there was no manner of doubt,' says Mr. Holmes in 'Known to the Police.'

In *The Times* report of June 20, 1910, there are two interesting cases of sentences being modified or quashed by the Court of Criminal Appeal.

In one an art dealer was charged with obtaining cheques by false pretences, that is to say by falsely representing the cost to him of the articles he sold. 'The ground of appeal was that the Recorder had admitted evidence tending to show that the prisoner had committed other frauds, but not tending to prove that of which he was indicted. The Judges thought 'not only that the jury may have been influenced, but that they must have been influenced' by this kind of evidence, and they quashed the conviction.

In another case the prisoner had been sentenced as a habitual criminal. 'But he had not been tried as such and he had not enjoyed the benefit of the formalities, somewhat complex, which must be observed in such trials. There was no alternative but to interfere with the sentence, which was reduced from six years' penal servitude to eighteen months' hard labour.'

The tenderness of English law for the habitual criminal is most touching. Mr. Holmes, Mr. Carpenter and others who have studied the question are struck by the extraordinary chances offered by our Law to the astute criminal. Nowhere in the world does he find such a happy hunting-ground as in this country and the United States. In the issue of *The Times* cited above, the leader writer, quoting an American lawyer, says: 'In America, an ounce of procedure is worth a pound of evidence.' There may be a verdict of 'guilty' and a sentence, but, asks the same authority, 'What do they amount to in the United States, if the prisoner has money enough to exhaust the resources of legal technicalities to save him?'

Here is another instance of a criminal escaping. The case is reported in *The Times*, of July 4, 1910. This is an appeal from a conviction for larceny before Mr. Justice Phillimore at Norwich.

Mr. Justice Darling delivering judgment (with him Mr. Justice Channell and Mr. Justice Bray) said :—

‘They felt themselves compelled to decide that the conviction must be quashed. The facts were that two men, of whom the appellant was one—the other had not appealed—went to certain auction rooms at Wymondham. The appellant took two old bicycles and put them in for sale by auction at a reserve price of £2 3s. 0d. It appeared that by arrangement between the appellant and the accomplice, a man named Sheen, who has not appealed, the latter was to bid the reserved price. He did so, but before he paid the money the appellant went to the auctioneer and obtained payment of £2 3s. 0d. The two men then left the place. Sheen never paid the auctioneer and the whole transaction was clearly a concerted scheme.

‘In these circumstances it had been contended on behalf of the appellant that he could not properly be convicted of larceny, of which he was convicted, although he might possibly be convicted of some other offence.’

Then after quoting a whole host of authorities on what does and does not constitute larceny, his Lordship continued : ‘Therefore there was nothing for it but to say that this case does not fall within the rule which would make this a case of larceny by a trick. The appeal would therefore be allowed.’

Our readers will observe that this case strongly supports our contention that not Justice but technical formalism is administered in this country. Our Judges have acquired the habit at the Bar of thinking in categories ; into one of these mental pigeon-holes every case must be fitted. Supposing a case does not fit any of them, or supposing it fits several but is wrongly labelled, in either event there will be a failure of Justice, because we have seen that the Judge, a product of the Bar, cannot resist the fascination of the subtleties which have been the delight of his youth. What simple Justice demands is a secondary consideration. Justice repudiates such judgments—they are not her

Courts where her sword is used to split hairs, where her scales are used to weigh trifles light as air, and where clearly established guilt escapes punishment. These are the Courts of Empirical Legalism. Centuries of special pleaders have palmed off this imposture upon us as Justice.

This failure of Justice is so outrageous that the Judges make a representation on the subject. They say : ' At the same time they desire to add that in their opinion the Legislature might well consider whether it was not time to prevent the occurrence of such a case as this by an enactment analogous to that which provides that, where on the trial of a person indicted for false pretences the facts established a case of larceny, the prisoner should not be entitled to be acquitted on the ground that the indictment was for false pretences. The Court thought there should be a correlative enactment under which the present appellant might have been found guilty of obtaining by false pretences. That could not be done as the law now stood. The Court also desire to say that, taking the view they did, the appellant had never been in peril upon the charge of obtaining by false pretences, and that he ought to be indicted with the other man Sheen for conspiracy ; and counsel should consider whether the appellant should not be indicted for obtaining money by false pretences.'

' They circle round in wandering mazes lost ! ' Still harping on labels, rather than administering Justice, they suggest a fresh trial and the expenditure of more money !

As regards the suggestion for fresh legislation in this matter of two guineas and an odd shilling, we would ask with great respect, to whom or what is the recommendation addressed ?

Of two things, one : either there is a Department of Justice in this country or there is not. Apparently the Judges are under the impression that there is. Observe



that the appeal for legislation is made to the 'Legislature,' not to a Minister. Although this is very vague, we cannot think that the Judges are capable of descending to a piece of mere make-believe. In the opinion of these gentlemen, there is something corresponding to a Department of Justice. Surely the public have a right to know more of this mysterious entity. In other countries, its duties are deemed supremely important. These comprise keeping in closest touch with the Judges, both as regards a meticulous scrutiny of their decisions and unremitting attention to their suggestions. These are essential parts of the building up of a great system which is at once the pride and the protection of the citizen. It provides him with weapons against injustice and with definite standards whose accuracy and accessibility our neighbours deem as indispensable to national efficiency as are these characteristics in standards of mechanical measurement.

Contrast with this admirable performance what our shadowy Department of Justice has done for us! We know nothing of it by its works. We take the Judges' word for its existence. It is part of the most expensive legal equipment in the world.

In *The Times* Law Report for March 21, 1912, we read of a case in which the County Court Judge of Lancaster County Court awarded a widow damages under the Workmen's Compensation Act in the following circumstances: 'The sailor in question had gone ashore without leave in the Port of Mobile, U.S.A., and stayed ashore all night. The next morning the ship had got in her gangways, cast off the ropes from the quay, and was already moving when the man was observed being partially carried towards the ship by a negro, in such a state of intoxication as to render him unable to walk by himself. With the assistance of a man standing on the quay and the negro he was pushed on to the deck. He reached it on his hands and knees,

in such a condition of incapacity due to intoxication as to resemble a sack of sand. He lay on the deck without moving for a minute or two, during which the vessel was angling out astern from the wharf. When the steamer's side was about three feet from the wall he tried to get on his feet on the deck. At that spot the rail had not been replaced, so he staggered backwards and fell into the water. A line was thrown to him but he did not struggle to seize it and he was drowned.' The learned County Court Judge held that he was drowned in the course of his employment. The decision was reversed by the Court of Appeal.

In *The Times* Law Report for January 20, 1912, there is an account of a case stated by the Justices of Cornwall upon their refusal to convict Alfred James Rogers of cruelty to a whale, the charge being preferred on the information of an inspector of the National Society for the Prevention of Cruelty to Animals.

It appeared that on July 1, 1911, a number of whales swam into the bay near Penzance and got stranded. As the tide receded they were left high and dry. The respondent caused one of the whales substantial pain and suffering by cutting it with a knife, that is by sticking a clasp knife into its body a little below the eye, drawing it down the belly and then in an upward direction inflicting a wound four or five feet in length and about two inches in depth. The whale showed by heavy movements of the tail that it felt the cutting of the knife. It lived for some time after the tide came in, then it sank from sight.

It was contended upon these facts that the respondent had been guilty of an offence under the Wild Animals in Captivity Protection Act, 1900 (63 & 64 Victoria, c. 33), section 2 of which punishes those who cause suffering to an animal which is in captivity or close confinement.

The magistrates found that unnecessary pain and suffering had been caused to the whale without any justification, but that although the whale was an animal

within the meaning of the Act, it was not in captivity or close confinement. They accordingly dismissed the summons.

After some cogent arguments from counsel who contended that there should have been a conviction, Mr. Justice Pickford delivered judgment. He said :—

‘The appeal must be dismissed. This result was very much to be regretted because the respondent fully deserved to be punished. Unless it was proved that the whale was in captivity or close confinement, no offence was committed. Here the whale was only temporarily confined because it could not walk. When the tide came in it could have got away, and many of the other whales on the beach did so escape.’ Justices Avory and Lush concurred.

These learned, upright and honourable men let a cruel ruffian go unpunished on the most transparent quibble. The public must be getting somewhat tired of those gentlemen’s regrets that they are so hidebound in pedantic formalism that they are not free to administer Justice. They are administering Legalism, not Justice. They are not to blame. It is the fault of the system. It produces Parkeists. They think in categories. Their allegiance is to the letter. They are the microscopists of the Inns of Court. Actuated by the highest motives which their narrow horizons will permit them to appreciate, they are indirectly the means of spreading lawlessness over India and America.

Under the heading ‘A Momentous Proclamation,’ the leading journal in its issue of September 8, 1911, referring to the Constitution of Nigeria, writes ‘For the first time in the history of West Africa the art of governing the native on native lines has become consecrated in British legislation, and the pernicious tradition of applying the Law of England to African land questions has been set aside. It is impossible to exaggerate the importance for good of such a departure from crude,

ignorant and unscientific precedent. It will be the duty of the Colonial Office, to which the greatest credit is due for having sanctioned this proclamation, to watch strictly that the principles laid down therein are not departed from in practice.'

Compare the extracts from Mr. Thorburn's work as footnotes to Chapter XXIV for the mischief worked in India by applying the Law of England to Indian questions.

In *The Times* of December 5, 1911, under the heading 'The Lord Chief Justice and first offenders,' there is the following from Francis Wellesley, Esq., J.P., Surrey, and a visiting Justice at Wandsworth Prison: 'Sir,—In *Rex v. Holder*, according to *The Times* of to-day (November 28th) the Lord Chief Justice said "He wanted to correct what appeared to be a misconception on the part of some people that first offenders who were sent to prison became the associates of old criminals. First offenders were kept separate from other prisoners."

'With all due respect to the Lord Chief Justice, the misconception is his own and not the public's.

'Whether the first offender is segregated or not depends on the character that the police happen to give him.

'At the very large prison at which I am a visiting Justice the procedure is as follows: After reception at the prison an enquiry form is sent to the police "who know about the case"—this form asks for particulars as to the prisoner's respectability, relatives, friends, previous occupation and manner of livelihood. If the "first offender" comes unscathed through this ordeal he most probably goes into the "Star Class" and is thus segregated; if he does not, he works with, and "becomes the associate of old criminals."

'I am far from defending this procedure; in fact, I deplore it, for, personally I would segregate every first offender; but the Home Office rule, as I have described it, is, I believe, the same that exists in every prison

in England. Sometimes these forms are filled up by just an ordinary police constable, and I myself have known the most misleading statements made (no doubt quite unintentionally) about very young fellows with all their lives in front of them and only convicted for quite small offences.

‘But so long as Judges, Justices, and, above all, stipendiaries refuse to commit to the second division, and only know prisons and prisoners from the outside, so long will this very serious abuse continue.

‘As regards the Home Office, as distinct from the Prison Commissioners, the long chain of Under-Secretaries and clerks, in so far as I have ever been able to discover, are simply bored with the whole subject of prison and penal reform.’

The following letter appeared in *The Times*, of April 9, 1912: ‘Can any of your readers who are versed in international Law suggest an adequate reason as to why Great Britain should have abstained from taking part in the International Agreement relating to Law costs as discussed at the Hague Conference? By virtue of this Agreement the citizens of participating States are placed on the same footing as native litigants, while British subjects are compelled to deposit very much larger sums in respect of pending lawsuits. In Germany it is approximately three times as much. Whatever object there may have been in Great Britain’s abstention it could hardly have been the interest of British subjects.’

Under the heading: ‘The Assizes: Lord Alverstone on the need for more Judges,’ *The Times* of July 6, 1912, has the following report: ‘The Surrey Assizes were opened at Guildford yesterday by the Lord Chief Justice.

‘His Lordship in charging the Grand Jury, referred to the need of more Judges on the King’s Bench. He said that they would have observed from the daily papers that complaints were made about the stoppage of work

in London, and attention was called to the absence of Judges on circuit. Speaking after a long life at the Bar, and after twelve years of active judicial work, he could only say that those who knew and understood the circuit system knew its advantages to the counties. The people who attacked the circuit system were those who knew the least about it.'

The circuit system is beloved of barristers and Judges. Consequently it will always find champions in the high places of Legalism. But what of the unfortunate prisoners who are detained for months awaiting trial? In what we call Assize towns there would be a High Court if we followed the example of our continental neighbours. They consider how the welfare of the public may be best subserved. A Government of advocates considers chiefly how the interest of the Bar may be furthered. Hence the diametrically opposite policy pursued here from that which recommends itself to our French and German neighbours.

This is an extract from the *Daily Mail*, of July 3, 1912. It is headed :

'Law Courts Delay.'

'Not a Single Special Jury To-day.'

'Business at the Law Courts is at a standstill. Of the most important class of cases—the special jury actions—not one is being tried to-day. Yesterday only one such case was tried in what is the Supreme Court for the country.

'Special jury actions and common jury actions which were set down for trial last April have not yet come on for hearing.

'No fewer than 349 cases stand for trial over and above the number at this time last year.

'Why is this? Mainly (writes a barrister) because the two vacancies caused by the death of Mr. Justice

Grantham and the retirement of Mr. Justice Lawrence have not been filled, and temporarily because most of the Judges are away in the provinces trying persons on such charges as the theft of a pair of boots, of some bacon, of two pipes and a handcart ! ’

‘ Mr. Justice Bray presided at Nottingham Assizes yesterday, as Lord Coleridge was kept by pressure of work at Derby Assizes. Mr. Justice Bray emphasized the arrears and the need of immediately increasing the number of Judges. ’

Here follows an extract from the *Evening News* of July 4, 1912. It is headed. ‘ Law Courts “ held up. ” ’

‘ Lack of Judges stops Jury Cases for the first time in Legal History. ’

‘ The oldest officials of the Law Courts cannot remember such a complete “ hold up ” of the business of the Courts as exists to-day. ’

‘ There is no jury Court in the King’s Bench to-day, and no one can recall that this has ever happened before. ’

‘ The illness of the Lord Chief Justice and Mr. Justice Darling have added to the seriousness of the condition, and arrears are piling themselves up. ’

‘ Everybody in the legal world is saying that the Government will be compelled to appoint at least two more Judges—or rather to fill up the vacancies caused by the retirement of Mr. Justice Lawrence and the death of Mr. Justice Grantham. ’

The following extract describing the administration of Justice in England before the advent of William of Orange, in the year 1688, enables us to understand the ready acceptance of the legend, the special pleader’s greatest invention, of the superlative excellence of the English Bench of our times. The comparison is not with the Bench among our neighbours but with the Judges under the Stuarts. This passage is from Lord Macaulay’s

‘ Essay on Sir James Mackintosh’s History of the Revolution ’ :—

‘ The earlier volumes of the State Trials, we do not hesitate to say, are the most frightful record of baseness and depravity that is extant in the world. Our hatred is altogether turned away from crime and criminals and directed against the law and its ministers. We see villainies as black as ever were imputed to any prisoner at any Bar daily committed on the Bench and in the jury-box. The worst of bad acts which brought discredit on the old Parliaments of France, the condemnation of Lally, for example, or even that of Calas, may seem praiseworthy when compared with the atrocities which follow each other in endless succession as we turn over that huge chronicle of the shame of England. The magistrates of Paris and Toulouse were blinded by prejudice, passion or bigotry. But the abandoned Judges of our own country committed murder with their eyes open. The cause of this is plain. In France there was no constitutional opposition. If a man held language offensive to the Government he was at once sent to the Bastille or to Vincennes. But in England, at least after the days of the Long Parliament, the King could not, by a mere act of his prerogative, rid himself of a troublesome politician. He was forced to remove those who thwarted him by means of perjured witnesses, packed juries and corrupt, hard-hearted, brow-beating Judges. The Opposition naturally retaliated whenever they had the upper hand. Every time that power passed from one party to the other, there was a proscription and a massacre, thinly disguised under the form of judicial procedure. The tribunals ought to be sacred places of refuge, where, in all the vicissitudes of public affairs, the innocent of all parties may find shelter. They were, before the Revolution, an unclean public shambles, to which each party in its turn dragged its opponents, and where each found the same venal and ferocious butchers waiting for its custom. Papist or Protestant, Tory or



Whig, Priest or Alderman, all was one 'to those greedy and savage natures, providing only there was money to earn or blood to shed.

'Of course, these worthless judges soon created around them, as was natural, a breed of informers more wicked, if possible, than themselves. The trial by jury afforded little or no protection to the innocent. The juries were nominated by the sheriffs. The Sheriffs were in most parts of England nominated by the Crown.'

'On March the 3rd, 1904, there were so many Judges sitting in the King's Bench—fourteen—that they did not know what to do for room, so one (Mr. Justice Swinfen Eady) had to go away. What an advertisement! Money turned away at the doors! But could it happen in any other civilized country that there should be a constant outcry at the Law's delays, and not a roof for the Law's ministers? '—'A Chance Medley.'

'A writer to *The Times* on June 14, 1905, mentions the fact that "a few years ago the High Court Judges received an augmentation of their salaries by an allowance of £7 10s. per day while on circuit." The history of this stipend is curious. As a result of the great Judicature Act of 1873, the Chancery Judges began to go circuit. . . . and they naturally put in a claim for travelling allowances. This was admitted, and, as the Common Law Judges were put to exactly the same expense, they, too, were held entitled to the same augmentation—though circuit had, so to say, been part of *their* contract from time immemorial.'—'A Chance Medley.' The italics are the author's.

What with the large vested interest of the Senior Bar in the paucity of Judges and princely emoluments and the small vested interest created by such augmentations as this just cited, it is to be feared that much water will flow under the bridges before the Circuit system is

abolished. It is a fairly safe prediction that abolition will not come until the public demands it. Various Commissions have been appointed ; one was appointed by Lord Loreburn, with Lord Macnaghten as Chairman about four years ago. We have not succeeded in securing a copy of the report. But it is well within our recollection that Lord Loreburn, then Sir Robert Reid, said in the House of Commons in 1897 : 'The delay which often occurs between the committal and the trial of a prisoner sometimes runs to two, three, and even four months and then he is found not guilty. It is perfectly shocking that such a state of things should exist.'

'It is true that after the Revolution, when the Parliament began to make inquisition for the innocent blood which had been shed by the last Stuarts, a feeble attempt was made to defend the lawyers who had been accomplices in the murder of Sir Thomas Armstrong on the ground that they had acted professionally. The wretched sophism was silenced by the execrations of the House of Commons. "Things will never be well done," said Mr. Foley, "till some of that profession be made examples. If the profession of law gives a man authority to murder at this rate, it is the interest of all men to rise and exterminate that profession."'

'On such occasions Coke's half-suppressed insolence and his impracticable obstinacy had a respectable and interesting appearance when compared with the absolute servility of the Bar and the Bench.'

'In State trials under Charles II the licence given to the witnesses for the prosecution, the shameless partiality and ferocious insolence of the Judge, the precipitancy and the blind rancour of the jury, remind us of those odious mummeries which, from the Restoration to the Revolution were merely formal preliminaries to hang-

ing, drawing and quartering.'—*Macaulay's Essay on Bunyan*.

In 'The Village Labourer,' by J. L. and Barbara Hammond, we read (p. 310): 'These same Lewes Assizes, conducted by Mr. Justice Taunton, afforded a striking example of the comparative treatment of different crimes. Thomas Brown, a lad of seventeen was charged with writing a threatening letter to Lord Sheffield, who gave evidence as to the receipt of the letter: the prisoner, who had no counsel, was asked by the Judge if he would like to put any questions. He only replied that he hoped his Lordship would forgive him. The Judge answered that his Lordship had not the power, and sentenced Brown to transportation for life. It is only fair to Lord Sheffield to say that he applied in vain to Lord Melbourne for a mitigation of the life sentence. Later on in the same Assizes, Captain Winter, a man of sixty, captain of a coasting vessel, was tried for the murder of his wife, who had been killed in a most brutal manner. He had been hacking and wounding her for four hours at night, and she was last seen alive at half past two in the morning, naked and begging for mercy. Her body was covered with wounds. The man's defence was that he came home drunk, found his wife drunk, and that he had no knowledge of what followed. To the general surprise Captain Winter escaped with a verdict of manslaughter. "The prisoner," wrote *The Times* correspondent, "is indebted for his life to the very merciful way in which Mr. Justice Taunton appeared to view the case, and the hint which he threw out to the jury, that the parties might have had a quarrel, in which case her death by the prisoner would amount to manslaughter only."'

The period dealt with in 'The Village Labourer' runs from 1760 to 1832, which is now ancient history. It is to be feared that despite the legend of the unapproachable

perfections of our Bench, which is now received as gospel, there are still grievous failures of Justice. In Sir Arthur Conan Doyle's book, 'The Case of Oscar Slater,' published in August 1912, the author reconstructs the crime, the murder of Miss Gilchrist, and reviews the evidence given at the trial. 'It is morally certain,' he declares, 'that justice was not done.'

It is a matter of common knowledge that in a series of addresses delivered in the most public manner, Major Apthorpe declares that 'The Victims of Judicial Injustice Redress Society,' 66 Fenchurch Street, E.C., of which he is a member, has definite information regarding upwards of a hundred cases of more or less flagrant failures of justice. Major Apthorpe's own case is one of these. We do not presume to investigate its merits. At the same time we cannot help considering it highly undesirable that grave allegations should continue to be made regarding the administration of justice in this country at the hands of one of our most distinguished Judges by a gentleman who had the honour to hold his Majesty's Commission for upwards of a quarter of a century, it is understood, with credit.

## APPENDIX U

In Mill's 'British India' we read: 'We may here observe one of the most remarkable of the expedients of the lawyers; that they have laboured from an early date to create and establish in the minds of their countrymen a belief that it is criminal to express blame of them or their system. This endeavour has been hardly less diligent than it has been successful. The belief has grown into one of the most rooted principles in the minds of the more opulent classes of Englishmen. That it is one of

the most pernicious prejudices is indisputable. For it is obvious that it confers upon the lawyers as far as it goes a complete and absolute license to make the system of which they are the organs—and upon which all the happiness of society depends—as favourable to their own interest at the expense of the community as ever they can. It is therefore a belief created by the lawyers for the protection of their own abuses.’

This is another extract from the same source :  
 ‘ That penal law in the hands of the British has failed so completely of answering its end is to be ascribed in a great degree to the infirmities and vices of the law itself.

‘ The qualities wherein consist the virtues of a system of Law appear to have been little understood in the past by British legislators. Clearness, certainty, promptitude, cheapness, with penalties nicely adjusted to the circumstances of each species of delinquency : these are the qualities on which the efficacy of a system of law depends. And in all these without one exception the penal law set up by the British in India is deficient to a degree that never was surpassed and has rarely been equalled. . . .

‘ The English form of practice, or course of procedure, consists of so many operations and ceremonies to which—however frivolous or obstructive to the course of Justice—the most meticulous obedience is rigorously exacted that the administration of English law abounds with delay ; is loaded with expense and paralysed by uncertainty. . . . Complicated, expensive procedure to a great degree annihilates all the advantages of law. . . . A system of law so marked by many infirmities may, in a country like England where crimes are easily suppressed and where the sentiments and manners of the people accomplish more than the law, afford an appearance of efficacy and get the credit of much of that order which it does not produce.

‘ Among the other prejudices of those who legislate in

India were the prejudices which owe their birth to the interests, and hence to the instructions, of lawyers. Of these it is one of the most remarkable and one of the most mischievous that to render judicial proceedings intricate by the multiplication of technical forms ; the rigid exaction of a great number of nice, obscure, pedantic and puzzling rites and ceremonies further the ends of Justice. . . . Of the intricacy and obscurity thus intentionally created one effect was immediately seen, the necessity for a class of hired pleaders called " vakeels,"'

It may seem at first sight that as this is history a century old, it is not relevant to the present situation in India. There cannot be a greater mistake, as M. Chailley's work clearly proves. Moreover, there is another witness whose investigation on the spot is even more recent than that of the distinguished French writer. We refer to the author of 'Indian Unrest.' He says : 'The politician, for instance, is too often a lawyer, and he has thriven upon a system of jurisprudence and legal procedure which we have imported into India with the best intentions, but with results that have sometimes been disastrous to thriftless and litigious people. Hence the suspicious dislike entertained by large numbers of quiet, respectable Indians for any institutions that tend to increase the influence of the " vakeel " and of the class he represents.'

In another passage in the same work Mill says : 'The gratitude of mankind is due to a Government which thus solemnly promulgated to the world the beneficent creed, that it is only by a code, that is laws existing in a given form of words, that the people can know the laws or receive protection from them ; that it is only by means of a code that Courts of Justice will apply the laws according to their true intent ; that the defects of all ordinances of law ought to be experimentally traced whensoever known. . . . Opinions more important to the interests of human beings were never emitted from human lips.'

Increasing litigation means an undesirable degree of uncertainty in the administration of the Law. The following figures are given on the authority of the *Pall Mall Gazette* for October 7, 1910. . . . There were no fewer than 1101 cases waiting in the King's Bench Courts. The figures for twelve years tell an eloquent tale of arrears. These run from 848 in the year 1899 to the present figures, namely, 1101 in 1910.

There is one theory, and only one, on which our patience with the legal caste is intelligible. The cult of the advocate is really our religion. And all successful religions have made enormous demands on the instinct of self-sacrifice in their devotees. Measured by this standard, Legalism takes a high place among religions.

In its issue of July 19, 1911, the leading journal has the following from its Berlin correspondent :—

‘ Patent litigation is much less costly in Germany than it is in England because most of the fighting is done before the patent is actually granted, that is to say before the Patent Office has given its final award. And even if the case is eventually taken to the Supreme Court, the cost does not usually exceed a few hundred pounds. Patent lawsuits running into thousands of pounds, such as are common in England, are unknown in Germany, and the best patent counsel will usually accept briefs for a thousand marks (about £50).’

On March 6, 1912, the following leading article appeared in *The Times* under the heading ‘ Administration of Justice in India ’ :—

‘ Justice moves with leaden feet in India. The announcement that the Dacca conspiracy case had been concluded in the Calcutta High Court this week directs renewed attention to a trial which the public have doubtless well-nigh forgotten. It began nearly two years ago. Early in August 1910 it became known that the existence

of a widespread conspiracy had been disclosed in Eastern Bengal. The leading figure was one Pulin Behari Das, who was one of the famous deported persons released in pursuance of a mistaken clemency. He was arrested, together with 41 other persons, on a charge of levying war against the King-Emperor by organizing societies with seditious objects and by committing robberies to procure funds for political purposes. It was stated at the time that the Government had evidence against many other individuals, but had decided to limit the number of arrests. The trial began before the Additional Sessions Judge at Dacca, with two Indian Assessors, on August 7th, 1910. Extraordinary evidence was given, which showed clearly that the organizations aimed—no doubt very ineffectively—at the overthrow of British rule. The members were crudely drilled, they were in possession of instructions for the making of bombs, and some among the unquestionably joined in the committing of robberies with violence. During the trial an Indian police inspector who had been largely instrumental in unravelling the conspiracy was shot and nearly killed. Another Indian witness who gave important evidence was shot dead whilst asleep. On June 18th, 1911, the two Assessors, after the fashion of Indian Assessors in districts where a reign of terror has been established, found all the accused not guilty. On August 18th, more than a year after the trial began, the Additional Sessions Judge delivered judgment. He acquitted seven men; three, including the ringleader, Pulin Behari Das, were sentenced to transportation for life, 17 to ten years' imprisonment, 14 to seven years and one to three years'. The convicted men appealed to the Calcutta High Court. The result is that 21 more of the accused are acquitted, the sentence on Pulin Behari Das is reduced to seven years' imprisonment, two others receive ~~six~~ years, and the remaining sentences vary from two to five years.



'The first thing which strikes the onlooker is the very long time it has taken to secure the final conviction of 14 out of the 42 original accused. We are well aware of the explanations which may be offered—the vast array of witnesses, the interminable cross-examinations, the innumerable byways in an exceedingly complex conspiracy. If this case stood alone we might be disposed to accept these pleas. But it does not stand alone. Not only is every political case in India allowed to be spun out inordinately—witness the Midnapur trials and the Manicktollah garden case—but the whole tendency of the Indian Courts is to permit a waste of time which would never be sanctioned in this country. The latitude enjoyed by counsel in India, especially in the lower Courts, has reached the dimensions of a general scandal, and points to weakness in the bulk of the judiciary. The second peculiarity which emerges is the singular discrepancy between the views of the Sessions Judge and the High Court. A wide divergence of opinion manifestly exists when the lower tribunal considers twenty-one men guilty who are acquitted on appeal. In this respect also the case does not stand alone. Last year we had a signal example of the difficulty which the Special Tribunal of the Calcutta High Court experiences in registering convictions for political offences. In the Howrah gang case thirty-nine men were charged with conspiring and collecting arms, men and money, with the object of overthrowing the Government. Of these thirty-three were acquitted and six convicted; but it is noteworthy that the tendencies of the six convicted men were sufficiently attested by the fact that they were already undergoing imprisonment for robbery. The difficulty apparently experienced by the Calcutta High Court is sometimes equalled by the reluctance of the Crown to seek convictions. In another case last year wherein six men were accused of tampering with the loyalty of the 10th Jats the prosecution was suddenly

withdrawn. A far more amazing case which occurred a few days earlier has repeatedly been brought to the notice of Parliament. A gang of 18 men, known as the Khulna gang, was awaiting trial upon a charge which may be compendiously described as political robbery. With the privity of both the Government and the High Court, a distinguished emissary saw the accused men in gaol, and under authority informed them that, if they pleaded guilty, they would be acquitted. They did so plead, and were at once released, although the evidence against them was grave. Lord Morley sought to excuse these wholly irregular proceedings on the plea that "the trial would have lasted a long time; and would have created a bad impression throughout the country," and he invited the House of Lords to condone this compounding of felony because, on their return to their villages, the accused "were sent for by an eminent Hindu gentleman who gave them a severe lecture on loyalty."

'We need make no apology for recalling these recent examples of the uncertainty of the administration of Justice. We do not say that the Calcutta High Court was wrong in its wholesale reversal and modification of the decisions of the lower Court in the Dacca case. It must be obvious, however, that there is some peculiar defect in a judicial system wherein such incidents as we have related are possible and frequently occur. The sweeping reversal of convictions in the lower Courts is not a characteristic confined to the Calcutta High Court alone. To take another of last year's cases—it is not clear that this example is political—twenty-one persons in the Budaon dacoity case, sentenced to terms varying from life to six years' imprisonment, were all acquitted by the Allahabad High Court. If appellate Courts did not on occasion reverse the decisions of the Courts below there would be no reason for their existence; but we are constrained to feel that the tendencies we have noted are just now specially strong

in Calcutta. Whether the Calcutta High Court sits as a Court of Appeal or, as in the case of the Special Tribunal, as an original Court, it shows a reluctance to convict persons charged with political offences, or a disposition to treat them with exceeding tenderness. If the damning evidence against Pulin Behari Das and his more intimate associates is accepted at all, it does not appear to us that the sentence of the lower Court was excessive. But we refer to this matter on wider grounds than those afforded by one particular case. In the excessive prolongation of trials, in the difficulty of convicting political offenders, in the veiled hostility that frequently exists between appellate and lower Courts, in the constant condemnation of police witnesses, and sometimes in the sudden unwillingness of the Government to seek the conviction of persons under arrest, we find reason to believe that the whole system of the execution of the law, the administration of Justice, and the working of the Courts, not only in Calcutta, but throughout India, needs to be subjected to close and systematic inquiry.'

When putting on record our acknowledgments and indebtedness to *The Times* we reiterate the expression of a hope that the leading journal will not confine itself to criticism, but support a sound constructive policy such as the experience of our neighbours has abundantly proved to be beneficent ; a policy that does not minister to the aggrandizement of a caste but is a potent instrument for establishing public confidence in the Law which is conspicuous by its absence in England, India and the United States.

Referring to the article cited above, there is mention of the latitude enjoyed by counsel in India ; it may therefore be interesting and not irrelevant to transcribe without comment a report which appeared in the *Evening News* of May 4, 1912. It is headed 'Breeze in Appeal Court.' There is a sub-heading 'Mr. Danckwerts, K.C.,

Disputes with a Judge.' And a third heading, 'Counsel's Protest.' The report begins :—

'There was a little breeze to-day between Lord Justice Fletcher Moulton and Mr. Danckwerts, K.C., when a Court of Appeal consisting of six Lord Justices met to decide a point that had been before three Lord Justices previously.

'Some time ago there was an application before Mr. Justice Bargrave Deane to commit for contempt a Mrs. Annie Scott, petitioner in a divorce case, and her solicitor, for publishing to certain people matters that had taken place *in camera*.

'Mr. Justice Bargrave Deane did not think that intentional contempt had been committed. He accepted an apology but directed that costs should be paid.

'From this order there was an appeal.

'At the hearing of this appeal Mr. Danckwerts raised an objection that no appeal was possible by rules of Court.

'The Lord Justices were divided in opinion and it was decided to hear the point argued before the full Court.

'After Mr. Danckwerts had opened his argument to-day Lord Justice Fletcher Moulton interrupted with an observation.

'Counsel said he thought his Lordship was mistaken:

#### 'MR. DANCKWERTS' PROTEST'

'Lord Justice Fletcher Moulton: "It is not very polite of you to say that my notions are mistaken."

'A little later his Lordship again interrupted to point out a certain fact.

'Mr. Danckwerts (speaking very warmly): "I know that is so; I said it to start with. It is impossible to argue with this sort of thing going on. I protest."

'When Lord Justice Fletcher Moulton made another observation later on, counsel retorted, "I am not quite without intelligence."

‘ After calm had prevailed for some time Lord Justice Fletcher Moulton made another objection.

‘ Mr. Danckwerts : “ I am going to show that it is not material.”

‘ Lord Justice Fletcher Moulton : “ I am not sure it is not material.”

‘ Mr. Danckwerts : “ Would not your Lordship’s observations come in better when I come to the point whether it is material ? ”

‘ Counsel went on with his reading.

‘ Lord Justice Fletcher Moulton . “ Will you read the next section ? ”

‘ Mr. Danckwerts (at the top of his voice) : “ Well, I am going to.”

‘ Lord Justice Fletcher Moulton asked with regard to a proposition laid down by counsel whether certain regulations would not apply.

‘ Mr. Danckwerts : “ No, they wouldn’t.”

‘ His Lordship : “ Why not ? ”

‘ Mr. Danckwerts : “ Because they don’t.”

#### ‘ I WILL HAVE MY ANSWER ’

‘ In the course of further discussion counsel clenched his fist and said, “ I will have my answer, I will not be cut short.”

‘ “ Will you allow me to finish ? ” protested the Lord Justice, when he was in turn interrupted.

‘ Mr. Danckwerts : “ You have.”

‘ Counsel mentioned a case in which he had taken a part. It was not reported, he said.

‘ Lord Justice Fletcher Moulton used a phrase “ If there is such a case.”

‘ Counsel (sharply) : “ Does your Lordship suggest there is no such case ? ”

‘ Lord Justice Vaughan Williams : “ You should not cross-examine in such tones.”

‘ Mr. Danckwerts : “ Does it mean I am telling a lie ? I resent that course of conduct.”

‘During Mr. Danckwerts’ lively speech, the Master of the Rolls, Lord Justice Kennedy and Lord Justice Buckley said very little. Lord Justice Farwell was silent, and so was Mr. Barnard, K.C., counsel on the other side.

‘Mr. Bayford followed Mr. Danckwerts on the same side.

‘He smiled blandly when Lord Justice Fletcher Moulton made observations on his argument.

‘The hearing was adjourned in an atmosphere of tranquillity.’

It is a most significant circumstance as indicating the changing attitude of the public to the legal profession that we read in *The Times*, of May 25, 1912, in a report of the progress of the Transport Strike, that ‘The course of procedure was settled at a brief sitting in the morning. A desire was expressed by some of the employers’ representatives . . . that they should be represented by counsel. The proposal was strongly objected to by Mr. Gosling, who declared that it was of the greatest importance that this should be “a man to man” inquiry, and eventually Sir Edward Clarke decided not to sanction the appearance of either counsel or solicitors.’

The time-spirit will not be denied. Narrow professionalism and reverence for technicalities are being found out.

In *The Times Law Report* of June 18, which appeared in the issue of June 19, 1912, there is a judgment of the Judicial Committee of the Privy Council in a case arising out of the suppression of a riot in India. The Judges present were Lords Macnaghten, Atkinson, and Shaw. The arguments were heard in April before a Board composed of Lord Macnaghten, Lord Atkinson, Lord Shaw, Sir John Edge, and Mr. Ameer Ali, when judgment was reserved.

## JUDGMENT

‘Lord Macnaghten, in delivering their Lordships’ judgment to-day, said : The pecuniary amount involved in this appeal is comparatively trifling. But the case is one of grave importance, and their Lordships are compelled to add that, in their opinion there has been a serious miscarriage of Justice in both the Courts which dealt with the matter in India.

‘In April 1907 Mr. Clarke, the appellant, was the district magistrate of Mymensingh, an extensive district in the province of Bengal. The principal suit, the result of which governs this consolidated appeal, was brought by the first respondent as plaintiff, claiming damages for trespass on the allegation that Mr. Clarke had illegally and wantonly searched his category and that Mr. Clarke had not only acted illegally but that he had acted out of personal malice and ill-will. The suit originally brought in the Court of the third subordinate Judge of Mymensingh was transferred at the plaintiff’s instance to the High Court in its extraordinary original civil jurisdiction. It was tried by Mr. Justice Fletcher. He found in favour of the plaintiff and gave a decree for Rs. 500, but without costs. Costs were not awarded to the successful plaintiff on account of the charge of personal misconduct which his Lordship held to be unfounded and grossly improper. Mr. Clarke appealed to the High Court in its appellate jurisdiction. The plaintiff filed cross-objections reiterating his charge of personal misconduct. The Court of Appeal, consisting of the late Chief Justice and Mr. Justice Harrington (Mr. Justice Brett dissenting) dismissed the appeal but without costs. The result is that a magistrate placed in a very difficult position and called upon to act on a sudden emergency has been adjudged guilty of trespass and subjected to a fine, though he seems to have acted properly, with courage and good sense, and strictly in accordance with the powers committed to him.

## 'THE FACTS OF THE CASE

'The facts of the case are not really in dispute. Jamalpur is a sub-division of Mymensingh. The zemindars in that part of the country are Hindus, most of them apparently absentees living in Calcutta. The bulk of the population is Mahomedan. For some time before the occurrence that led to this suit, owing, it was said, to the measure known as the partition of Bengal there had been a good deal of disaffection and excitement in the district and the relations between the Hindus and the Mahomedans were dangerously strained. On April 21st, 1907, there was a large fair or Mela held at Jamalpur. Some Hindus, apparently at the instance of the servants and agents of the plaintiff and his co-sharers, known collectively as the Gouruckpur zemindars, tried to prevent the sale of bideshi or foreign goods. The Mahomedans resented this attempt. There were serious disturbances out of which there sprang up a bitter feeling between the Hindus and the Mahomedans.

'On the evening of April 27th some Hindus dressed, or supposed to be dressed, in Mahomedan clothes were wandering about the town. They were followed by a band of Mahomedans. The Hindus turned on the men following them and fired three or four revolver shots, and a Mahomedan was wounded. An uproar followed. Mr. Barniville, the sub-divisional Magistrate of Jamalpur, and Mr. Luffman, the District Superintendent of Police, who were then in the dak bungalow, hastened to the scene of disturbance. They met some Mahomedans carrying away the wounded man, and they received information that the persons who had committed this offence had fled in the direction of the cutcherries of the Gouruckpur zemindars. These cutcherries appear to be close together in an open piece of ground. Hard by is a temple of Thakurain Doya Moyee. An excited crowd of Mahomedans were collected there apparently bent on attacking the



cutcheries. The sub-divisional Magistrate and the District Superintendent of Police found 40 or 50 men armed with lathies. After they had disarmed them they were told that armed men were concealed in the temple. They went there. They found the doors locked and were refused admittance. The sub-divisional Magistrate ordered the persons inside to open the doors, assuring them of protection. In response several shots were fired from inside and a man was wounded slightly. The two officers then withdrew after dispersing the Mahomedan crowd outside.

‘The sub-divisional Magistrate wired at once to the Commissioner of the division, and the District Superintendent of Police sent a telegram to Mr. Clarke to the following effect : “ Serious riot just averted ; come at once.” Mr. Clarke received this telegram at 2 on the morning of April 28th. He started for Jamalpur by the first train and arrived there at 10 A.M. On his arrival he found the following telegram from the Commissioner, headed “ Urgent ” : “ Barniville has wired for available armed police by special train, saying serious disturbance impending. What do you know ? Can you send Gurkhas from Mymensingh to be replaced if required by men from here ? Dacca.”

‘ Mr. Clarke, who had spent most of his time after the Mela disturbance between Jamalpur and Mymensingh, and knew the state of feeling in the district, took counsel with the Superintendent of Police and the sub-divisional Magistrate. From what he heard and from what he knew himself he came to the conclusion that it was his duty to search the cutcherries. And accordingly he did so, accompanied by the sub-divisional Magistrate, the police officer and a force of police. The plaintiff’s cutcherry was found locked. It seems that the jamadar in charge of the building had locked it up and left at 1 P.M. There was no one on the ground to open the doors. So the doors were forced open. Boxes in the cutcherry were also opened and their contents taken out. The actual

search within the building was made by the police, but Mr. Clarke had charge and direction of the whole proceedings. He remained outside. There was nothing of an incriminating nature found in the cutcherries.

#### ‘ THE RIGHT TO SEARCH

‘ The question and the only question on the appeal, is whether Mr. Clarke was authorized by law to make the search. That depends on the Provisions of the Code of Criminal Procedure and on nothing else. It cannot be denied that a serious offence had been committed against the public tranquillity and that under the Code of Criminal Procedure (which defines offences against the public tranquillity and is summarized in Chapter VIII of Schedule II of the Code) every member of the unlawful assembly from which the shots proceeded was equally guilty of the offence. Nor can it be disputed that it was the duty of the District Magistrate to enquire into that offence.

‘ Now Section 177 of the Code provides that every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed. Mr. Clarke, by virtue of his superior rank, superseded the sub-divisional Magistrate of Jamalpur and properly assumed jurisdiction there.

‘ An enquiry under the Code is a proceeding distinct from a trial. There is no definition of the word “ inquiry ” in the interpretation clause, section 4. But there is this explanation of the term as used in the Code : (k) Inquiry includes every inquiry other than a trial conducted under this Code by a magistrate or Court. Section 36 is in the following terms : “ All district Magistrates, sub-divisional Magistrates, and Magistrates of the first, second and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called “ their ordinary powers.” Schedule III, referring back to section 36, defines the ordinary

powers of a Magistrate of the class immediately below that to which he belongs with further powers appertaining to the Magistrates of his own grade.

‘Among the “ordinary powers” of a Magistrate of the third class specified in Schedule III is: “(8) Power to issue search warrants Section 96.” In Section 96 the following provision occurs: “Where the Court considers that the purpose of any inquiry, trial, or other proceeding under this Code will be served by a general search or inspection it may issue a search warrant.” Then Section 105 provides as follows: “Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant.” It seems clear that these sections and Schedule II give Mr. Clarke authority to direct a search of the plaintiff’s cutcherry in his presence if he considered it advisable to do so.

#### ‘THE PROCEEDINGS BELOW

‘Now the learned Judge disposes of Mr. Clarke’s defence in rather a summary manner. Beyond referring to Section 105 he does not consider or refer to any of the sections on which the defence is based, nor does he deal with Schedule III at all.

- ‘On appeal the late Chief Justice and Mr. Justice Harrington took the same view and dealt with the matter much in the same way. After citing Section 105 the learned Chief Justice proceeds as follows: “The Magistrate can only act under this section where he is competent to issue a search warrant that takes us to Section 96. That section applies to the issue of a search
- warrant by the Court. Here the defendant was not acting as a Court, and all that Section 105 enacts is that
- instead of the Court issuing a search warrant the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a magistrate, but the section does not assist the present

defendant." And the opinion of Mr. Justice Harrington is to the same effect. If his Lordship had read to the end of the form in Schedule V, he would have seen that it disposes of his theory altogether. The form contemplates the issue of a search warrant before any proceedings of any kind are initiated and in view of an "inquiry about to be made."

'It would seem that both the trial Judge and the learned Judges who formed the majority of the Court of Appeal were misled by the use of the word "Court" in Section 96. For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally if not always as convertible terms. The ordinary powers of all Provincial Magistrates are declared to be those "hereinafter conferred upon them and specified in the third schedule." That means : conferred upon them by the Act and specified in the third schedule to the Act. As appears by the schedule the power to issue search warrants is specified among the ordinary powers of all Provincial Magistrates, but the only section conferring the power is Section 96, to which the schedule itself refers.

#### ' THE APPELLANT'S ACTION JUSTIFIED

'It seems to their Lordships therefore clear that what Mr. Clarke did was warranted by the Code. If that be so there is an end of the case.

'Two other points were discussed by the trial Judge and the learned Judges of Appeal at much greater length than the ground on which the real defence to the action was based. It seems that the defendant or his advisers, not content with relying on the Code of Criminal Procedure, unwisely perhaps prayed in aid Section 25 of the Indian Arms Act, 1878, and also Act No. XVIII of 1850, entitled an Act for the Protection of Judicial Officers.' The one seems inapplicable ; the other in the present case wholly unnecessary. Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr.

Clarke not having complied with the preliminary condition prescribed by the Arms Act, cannot defend his action under that Statute. On the other hand they have no doubt that Mr. Clarke, in directing a general search of the plaintiff's cutcherry in view of an enquiry under the Code of Criminal Procedure, was acting in the discharge of his judicial functions, and they think that if it had been necessary he might have appealed for protection to the Act No. XVIII of 1850.

‘ Their Lordships think that there was no foundation for the suit. Mr. Clarke’s action under the circumstances was quite justified. The charge of personal misconduct advanced and reiterated without any shadow of proof deserves the severest reprobation. Their Lordships will therefore humbly advise his Majesty that this appeal ought to be allowed, the order of the Court of Appeal discharged, and the suit dismissed with costs in both Courts. The respondent must pay the costs of the appeal.’

If the curious in such matters will refer to Chapter VIII they will find the history of a series of judgments in various High Courts in India regarding the interpretation of the word ‘ Court.’ That series lasted for the best part of five years, and although the difficulty was first raised in 1905 and was settled in the autumn of 1910, for three years it ran concurrently with Mr. Clarke’s case and the appeals therein. There is an intimate connection between these two illustrations of Legalism : they turn on the same point, and if the barrister-Judges could have accepted the obvious and natural meaning of words instead of allowing themselves to be mystified by the hair-splitting

- dialectics of the Bar, what an expenditure of time and money might have been spared ! Another question
- forces itself on the reader’s attention : Do the barrister-Judges in India possess an adequate knowledge of the Code of Criminal Procedure ? ‘ If his Lordship had read to the end of the form in Schedule V he would have

seen that it disposes of his theory altogether.' Under Appendix H will be found an instance of another barrister-Judge's ignorance of the Indian Evidence Act. It is noteworthy, too, that the Chief Justice before whom Mr. Clarke's appeal was heard is Sir F. Maclean, whose extraordinarily far-fetched interpretation of the word 'Court' helped materially to contribute to the five-years-long contest that raged round that simple word. So that we find in Mr. Clarke's case three barrister-Judges reversed, and the only Judge, Mr. Justice Brett, who is proved to have formed a sound judgment, is a civilian. The fact will not fail to be appreciated by the unprejudiced reader. He will have no sort of doubt that the Legalist vagaries of the barrister-Judges have reached a point which is nothing short of a menace to our rule in India. It is simply intolerable that magistrates who are responsible for order should be subjected to years of litigation involving ruinous expenditure with loss of credit and authority owing to the deplorable subservience of the barrister-Bench to the fantastic figments of astute pleaders; and even if their manoeuvres fail in the long run, as in this case, they have succeeded in harassing and pillaging the true friends of the dumb millions of India. It is political suicide to play into the hands of disaffection. This our barrister-Judges unconsciously do because they are a helpless portion of a vicious system.

The Calcutta correspondent of *The Times* in a telegram appearing in the issue of June 20, 1912, says: 'The Privy Council's judgment in the Clarke case gives great satisfaction among Europeans, official and unofficial. The view held here, since Mr. Justice Fletcher's judgment four years ago, has been that it was fatal to magisterial efficiency to penalize them for omitting technical informalities in coping with grave emergencies.

'Civilians welcome the Privy Council's decision as telling strongly against the demands for more barrister-Judges, inasmuch as the dissentient judgment of the

civilian Judge in the Court of Appeal has been upheld against that of three barrister-Judges.'

The Calcutta correspondent of *The Times* had only learned the result. He had not seen the full report of the judgment. It is more strongly in favour of the magistrate than the impression prevailing in Calcutta. The Committee of the Privy Council does not find that he omitted any technical formality whatsoever. There is not even that paltry pretence to keep the barrister-Judges in countenance. The shade of Baron Parke disowns them. They may possess his acumen but not his industry. They have not mastered the Code which they administer. Their allegiance has too long been paid to Common Law. We read recently that English Judges who have practised long at the Bar do not shine in administering a Code in Egypt. To be constantly harking back to authorities even when their rulings are irrational is an indifferent training for the administration of a Code.

This is an extract from that most interesting and instructive book 'The Confessions of a Beachcomber': 'The trail of the lawyer vine (*Calamus obstruens*) with its leaf sheath and long tentacles bristling with incurved hooks, is over it all. It is a vegetable of tortuous ambitions, that defies you, that embarrasses with attention, •arrests your progress, occasionally envelops you in a network of bewildering, slender and cruelly armed tentacles and everywhere bristles with points, that curves back on itself and makes loops and wriggles; that springs from a thin, sprawling and helpless beginning, and develops into almost miraculous lengths, and ramifies and twists and turns in "verdurous glooms," ascends and descends, grovels in the moist earth and among muddy leaves, clasps with aerial rootlets every possible support, and eventually clambers and climbs above the tallest tree, twirling its armed tentacles round airy nothings. It blossoms inconspicuously, and its fruit is as hard, tough and dry as an argument on torts. Ordinary mortals call it a vine.

Botanists describe it as a prickly climbing palm, and no jungle is complete without it. . . . Sometimes when it is severed with a sharp knife there flows from the cane a fluid bright and limpid as a judge's summing up. . . . In all this the lawyer cane is the most aggressive and hostile . . . One cannot cut jungles and escape bloodshed, for the long tentacles of the lawyer catch you unawares sooner or later, and then, for all are set with double rows of recurved points, do not endeavour to escape by strife and resistance—it is no use pulling against those pricks—but by subtlety and diplomacy. The more you pull the worse for your skin and clothes ; but with tact you may become free, with naught but near scratches and regular rows of splinters. The points of the hooks to which you have been attached anchor themselves deep in the skin, tear their way out, rip and rend your clothes, and your condition of mind, body and estate is all for the worse.'

## APPENDIX C2

There was a 'breeze' at the meeting of the Law Society in Cardiff on September 25, 1912. The proximate cause was a proposal put forward by Mr. Francis Nunn, of Colwyn Bay. *The Times* of the 20th gave it a heading in large type :

### AN INNER CIRCLE IN THE PROFESSION

The report tells us that 'this proposal Mr. Nunn prefaced by declaring that the present system had two serious defects : first, there was keen competition manifesting itself in the soliciting of business and the acceptance of fees greatly below what solicitors were fairly entitled to ; and secondly, there was no sort of guarantee that every solicitor whose name appeared in the Law List was a man of substance and integrity, one to whom the



public and his colleagues could, with confidence, entrust large sums of money.

‘The solicitor in England, should be dealt with and controlled on the same lines as a French *avoué* or *notaire*, or an English stockbroker. The inner circle which he contemplated would, he believed, command a measure of confidence which the profession at large did not and was not likely to enjoy.

‘As to the constitution of this inner circle, he submitted tentatively the following among other suggestions: Solicitors only of a certain number of years’ standing, three perhaps, or five, should be eligible for it; each member would pay a moderate entrance fee and annual subscription; he would deposit a sum of money, perhaps £500, on which he would receive interest and which would be available for his creditors if he failed. He would have two or more sponsors, solicitors, say, of ten years’ standing, each of whom would make a declaration that he would accept the candidate’s cheque for, say, £1000; his books would be periodically audited by the chartered accountant of his own selection; he would be subject to censure, dismissal or other discipline at the hands of the inner circle or its Committee.

‘The President, in the name of the Society, entered an emphatic protest against the aspersions and reflections cast upon the honour of the profession by Mr. Nunn. Every year, he said, the standard of the profession had increased and was increasing. There were 17,000 certificated solicitors, and the total number of complaints that came before the Discipline Committee last year was only 55, and of these only about 5 were found to be guilty of practices which led to their being struck off the rolls. He declared emphatically that there was no profession—stockbroking or banking—and no business where the number of black sheep was so small as in the legal profession. It was unfounded statements by members of their profession which did such a deal of harm. (Cheers.)

‘ Finally, addressing the author directly, he said, “ How dare you, Sir, cast reflections on the profession to which you belong ? ”

‘ Other members also repudiated the statements of Mr. Nunn, who, in reply, asserted that cases of malpractice on the part of solicitors sometimes never reached the Council, because they knew it would be futile to bring them. (Cries of “ No, no.”)

‘ The President : “ I won’t allow you to say such a thing.”

According to the *Daily Mail* report of this incident, Mr. Nunn stuck to his guns and had the last word :

‘ Mr. Nunn : A case came before us in the Chester district which certainly, if it had happened in France or Germany, would have been brought before the tribunals of the profession ; but it was not brought before the Law Society because it would have been futile to do it. (Cries of dissent.)

‘ The President : “ Next paper, please.” ’

Our readers will perceive that there is nothing unreasonable or offensive in the suggestion that the English solicitor should be brought into line with the French *avoué* or *notaire* in finding sureties. The amounts required in both cases are given above.

In this family quarrel as to the necessity for an inner circle in the legal profession, we do not propose to take a side. But we may be permitted to call our readers’ attention to the fact that the comparison instituted by the President of the Law Society between lawyers on the one hand and bank clerks or stockbrokers’ clerks on the other, as to the frequency of their respective delinquencies, is manifestly fallacious because the respective conditions are in their nature different. In ninety-nine cases out of a hundred swift detection dogs the steps of the transgressor in bank or stockbrokers’ office. Whereas the chances of detection in the case of the solicitor, not his

clerk—mark the distinction—are extremely small until after many days.' What is more obvious than the loopholes provided, by lapse of time and the contingencies it connotes, such as absence, death, and the hope of making defalcations good in coming years? Such considerations, however, are quite distinct from the objection taken by Mr. Nunn to the President's comparison on the ground that minor delinquencies are not reported to the Discipline Committee because its indifference to its duties is notorious.

This is by no means the first time that such an accusation has been levelled against the Discipline Committee of the Law Society. Mr. Nunn's reiteration of it is noteworthy. The gravamen of the case he cites is that not only he himself but other members of the profession acting with him entertained strong opinions as to the laxity of the Discipline Committee.

Some years ago this matter was the subject of a good deal of discussion in the Press. *Truth* more especially dealt with it at great length, taking as its text the case of Joshua Jones alluded to in Chapter IX. Moreover, the same journal entered a vigorous protest against an attempt on the part of the Law Society to extend the powers of the Discipline Committee.

This protest has a special interest at the present moment in view of the following passage in the President's speech in opening the meeting at Cardiff :

'As an honourable and learned profession,' he said, 'they' ought to be put into the same position as other professions, and, subject to an appeal to the Court, should be allowed to deal out punishment themselves, and they were promoting a Bill for the purpose.'

We submit, with all confidence, that the President has fallen into another false analogy. The fiduciary relations existing between lawyer and client have no counterpart in those obtaining between doctor and patient or priest and parishioner. They are on entirely different planes, and these are so far apart that no real analogy is possible.

But this may<sup>1</sup> seem an academic view, so we do not labour it, but quote *Truth's* objections, which are based on the past history of the Discipline Committee, as the journal understood them. In the issue of January 18, 1900, it commented as follows on this subject :—

‘In the eye of the law a solicitor is an officer of the Supreme Court, and on principle the power to remove him from that position ought not to be delegated to any less authority than the Court itself. At the same time if the attempt is to be made seriously to arm the Law Society with this power, it becomes of more importance than before that the public and Parliament should be clearly informed of the manner in which the Incorporated Law Society at present exercises such powers as it possesses in regard to the punishment of professional offences. Referring to the case mentioned in *Truth* where a client who had been heavily robbed by a trustee-solicitor was advised by another solicitor that it would be a waste of time to bring the facts before the Incorporated Law Society, another large London solicitor tells me that he himself, as the result of his experience, gave on one occasion similar advice to a client who had consulted him after being defrauded by another solicitor. . . . The cases in which the powers of the Law Society are successfully invoked without the criminal law having been already set in motion are comparatively few. On the other hand there is too much reason to suppose that breaches of professional conduct by which clients are seriously damaged are very numerous. . . . The position seems to be that the Incorporated Law Society, having already shown itself averse to the washing of dirty linen under any circumstances, is now seeking powers to do its washing in secret at its own unfettered discretion.’

The complete accord between *Truth's* criticisms of twelve years ago and Mr. Nunn's assertions of yesterday will not be lost upon our readers.

It is noteworthy that a cryptic passage in the speech of a past President of the Law Society alluded, in all probability, to the Bill now being promoted. Addressing Mr. Lloyd George, the present Chancellor of the Exchequer, on the occasion of the presentation of his portrait in the year 1909, the President used these words:

‘In conclusion, we ask Mr. Lloyd George’s sympathy in his position in the Government, with the removal of grievances under which solicitors labour which could only be effected by Parliament. What we ask for would not be injurious to other people, but very advantageous to the profession. If they could satisfy him that their claims were just, they would hope for his friendly and powerful assistance.’

Mr. Lloyd George made no public response to this appeal, and soon after that date, idyllic relations suffered such catastrophic change that a resolution was said to have been proposed at a meeting of the Society for the removal of the very portrait from its walls at the presentation of which much incense was burnt and a forward policy adumbrated. Angry speeches have been forgiven if not forgotten and after an appropriate interval the policy of three years ago is apparently being revived. The public will do well to bear in mind that the removal of grievances is an euphemism which has often masked the extension of privileges.

In its issue of September 27, 1912. *The Times* devotes a leading article to ‘The Law Society and Legal Reforms.’ The writer extends unqualified support to the President’s animadversions on the uncertainty of the Law and the preposterous fees paid to barristers and expert witnesses. He expresses approval of the Society’s policy in banging, bolting and barring the door against women. The ‘inner circle’ proposal is disposed of in the last two lines with contemptuous brevity and the name of the proposer is not even mentioned.

We cannot help thinking that the attitude of *The Times* on this subject is open to the charge of inconsistency. The matter is intimately associated with the public interest. And although it is true that the public have short memories, they cannot have forgotten the series of depredations which robbed the late Lord Amherst of a large fortune. Malpractices on such a scale extending over years would be rendered impossible by the frequent audit proposed by Mr. Nunn. But that is not all ; there is a decided weakening on the part of *The Times* in its zeal for much-needed reforms in this special direction. Between two and three years ago a proposal was made at a meeting of the Law Society to compel the keeping of separate accounts for the moneys of clients from the accounts of the solicitor's own resources. The proposal was lost, and the vote drew a severe reprimand from the leading journal. The obscurantism of the majority was denounced. They were advised to put their house in order lest worse things should befall them. *Rio passato, santo olvidado*. The sale of Lord Amherst's library is forgotten and the precautions suggested by Mr. Nunn are termed preposterous. If the mention of an inner circle seems to be establishing invidious distinctions, common fairness demands that either separate accounts, the audit, or sureties—if not all three together—are innovations justified by the practice of our neighbours and demanded by the unfortunate experience of numbers of our own subjects. The discussion of such innovations involves no aspersion on the members of the legal profession. On what bases of fact, we may well ask, is their superiority inferentially maintained over French avoués and notaries or the members of the London Stock Exchange ? If the fiduciary relations between solicitor and client are exceptionally intimate, it is an argument in favour of exacting usual safeguards for the latter. That has been the attitude of the French and other Continental Governments.

## APPENDIX E2

On reading the outspoken criticism of our grave legalist defects, by Mr. C. Leopold Samson, President of the Law Society, we are tempted to exclaim, 'Is Saul also among the prophets!' The following extracts are from the President's Address at the 57th Provincial Meeting, opened at Cardiff on September 24, 1912, and reported in *The Times* of the following day:—

'Did they not constantly find that the work was decreasing and the remuneration becoming smaller? To what was this due?

'To his mind it was due to several causes. The first was officialism (cheers) and the inroad made on their profession and the emoluments taken by public departments. It might be a good thing or a bad thing for the State to try to do everything. He was not going to discuss that question at length, so he only said he thought they ought to watch and pray.

'But far more than officialism, as far as litigation at all events was concerned, this state of things was due to three things—delay, uncertainty and cost. (Cheers.) As regards delay, the Government had told them they proposed to appoint a new Judge in the King's Bench Division. This was simply playing with it. They ought to have taken a bold step and appointed two. (Cheers.) As regards uncertainty, the constant upsetting of decisions in the Court of Appeal, and the constant restoring of decisions below by the House of Lords was most unsettling, and he believed that quick, certain, though bad law, was sometimes to be preferred to slow, uncertain and good law. (Laughter and cheers.)

## ' COUNSEL'S FEES AND COSTS

'The great thing after all, and the chief deterrent, was the expense of litigation. Now what was this caused by?

Not by the remuneration to the poor solicitors. It was caused by Court fees, Counsel's fees and fees to expert witnesses. He had been in practice for a great number of years. He went to the office as a lad of 14, and he would be 60 in January, so he had been nearly 46 years in the business. He had seen all sorts and conditions of practice, and he remembered the time when there were quite as eminent members of the Bar as there were now, and when the fees paid to those men were absolutely insignificant compared with the fees paid now. He considered that the great deterrent to litigation was the enormous cost caused by Counsel's fees. (Cheers.) The time had come when a stand ought to be taken against it. It only required a few of them to combine and say they would not pay these ridiculous fees for the thing to tumble down like a house of cards.

#### 'BILLS OF COSTS

'There was another thing, and that was the ridiculous disparity between taxed costs and solicitors' and clients' costs. It seemed monstrous that a litigant who was successful should be mulcted in the enormous 'expense that he was now, and especially in the case of a successful defendant who was forced into litigation. There ought to be a practical indemnity against costs, except, of course, the costs incurred by over-caution or by extravagance. As to the way in which solicitors had to make out their costs, it was really a relic of barbarism. They had to make out their bills by really charging things they did not do, in order to get remuneration for things they did (laughter), and the client hated that way of charging. He did not like to see a long bill of costs made up by—"attending counsel; paying his fee and clerk" (and why they should pay his clerk the Lord only knew): "drawing up and despatching telegram to you": "term fee" (which he never understood); and a long list



of ridiculous items of the kind. Why was it not possible in contentious matters to arrive at a different system? Why could they not make agreements with their clients as to what they were going to charge them? (Cheers.)'

Legalism has overreached itself, and all the tinkering suggested above will not mend matters. On one point, more especially, the President of the Law Society is over-sanguine. A combination of a few solicitors for the purpose of checking the amazing increase in counsel's fees by refusing to collect them—not to pay them, that is the client's privilege—is a forlorn hope. Should the suggestion take practical shape, which is highly improbable, we put our money on the Senior Bar. They will counter by a demand that clients should have direct access to the advocate. Extracts from 'Anomalies of English Law,' by a Barrister, quoted under Appendix B, shows that this change is already a subject of discussion. The increasing friction between the two branches of our Legalism is an encouraging feature. It is in striking contrast to the mutual admiration and the fulsome compliments of the worst periods of our legal history.

Commenting upon the address of the President of the Law Society 'A Barrister of 20 Years' Standing,' in the *Daily Mail*, of September 26, 1912, makes the following statements:—

'Barristers' clerks—the most rapacious of mankind—may see the writing upon the wall in the remarks made at Cardiff by Mr. Samson, President of the Law Society. . . . There can be found chapter and verse for Mr. Samson's view. The master-in-law of the present writer used to relate that he well remembered a notice in the chambers of Mr. Benjamin, Q.C., the greatest commercial lawyer the English Bar has ever had, which stated that Mr. Benjamin could not consider any papers without a preliminary fee of 500 guineas.

## '1000 GUINEAS AS PRELIMINARY

'To-day there are a round half-dozen men on the Common Law and Chancery sides who will not read papers without a preliminary fee of 1000 guineas. And they get it, though they are pygmies to Benjamin and men still with us though out of practice like Macnaghten and Arthur Cohen.

'When it is remembered that such an initial or special fee means 500 guineas on the brief, with daily refreshers in proportion, the total may be imagined. A leader of minor eminence now expects 100 guineas on the brief and a refresher of 25 guineas a day. In a special jury case the amount of a seven days' hearing may be left to the respectful imagination of the lay client.'

## APPENDIX H2

Overwhelming evidence of the powerlessness of the barrister-Bench of the Calcutta High Court will have prepared our readers for further developments of an untoward nature.

The following telegram under date September 25, 1912, from Calcutta appears in *The Times* of the following day :—

'The murder of Rotilal Roy, a Dacca head constable, is obviously an act of revenge for the part he took in working out the Dacca conspiracy case. There is no reason to suppose that it indicates any revival of unrest, though it may mean that accused persons were released by the Calcutta High Court who ought to have been imprisoned.'

When the Khulna gang were<sup>\*</sup> released, a Hindu gentleman was to read them a severe lecture on loyalty, Lord Morley told the House of Peers. We are not told if this specific was administered to the Dacca gang. If so, it does not seem to have been conspicuously successful.

Immediately following the telegram just cited, there is in the same issue another from Calcutta of the same date. Its tenor is still more disquieting. It is headed 'THE CALCUTTA HIGH COURT.'

'The European Defence Association has presented an address to the Government demanding an urgent inquiry into the working of the High Court, which, the Association asserts, is becoming an arena of political intrigue. There is grave reason to fear, the address adds, that a recent judgment was not devoid of political bias.'

That the Calcutta Bar should go from triumph to triumph was clearly indicated. The impotence of the Bench is complete. Larger and larger demands will have to be made presently on the ingenuity of the special pleader and the credulity of the public in justifying a condition which is a surrender to disaffection and a negation of Justice.

## APPENDIX S2

Reference has been made in our last chapter to causes which inevitably tend to strengthen the Bar throughout Anglo-Saxondom and weaken the Bench. This phenomenon is not observed in other countries where the Bar does not produce the Bench. Our innovation—which is indefensible on theoretical grounds—is at this moment making the administration of Justice in India and the United States a solemn mockery. In both countries, the Bench is gradually effacing itself under the continual encroachments of the Bar. These extort one graceful

concession after another in the friendliest possible way. Never was there such a dutiful child as the Bench to its progenitor—the Bar. If the process of effacement is less marked in this country, we have only to look beneath the surface and we shall be constrained to admit that the difference is merely one of degree. The constant increase in cases that are properly called speculative, the enormous increase of fees paid to leading barristers, are different aspects of the fact that the administration of Justice has degenerated through the vices of our legal system into a species of gambling transaction. Chances rather than facts are in question. Hence money is piled upon favourite counsel, and an action-at-law has come to bear a close resemblance to a ‘flutter’ on the turf.

The analogy is patent to all observers. *The Times* gives it full recognition in a leading article in its issue of September 27, 1912. We read :—

‘What is a litigant to think if his counsel tells him, “You may succeed in the Court below ; you will very likely fail in the Court of Appeal, though one member of it may be in your favour ; but you are just as likely to have a majority of the Law Lords” ? A racing prophet could speak more precisely as to the result of the Grand National.’

## APPENDIX T2

The extent to which purely technical considerations are believed to influence our Judges at the present time may be inferred from the following extract from a letter in *The Times* of September 24, 1912, over the signature, ‘J.P.’ :—

‘I was recently informed by the Registrar of the Court that about 140 sentences had been quashed by

Court of Criminal Appeal, and, though the number has been slightly increased since then, I am content to take that figure. I have read all the reports of these cases which have appeared in *The Times*, and I challenge Sir Herbert Stephen to mention two—I doubt if there has been one—in which the person convicted was, in popular language, innocent.'

Frequent allusions will be found in these Appendices to acquittals on purely technical defects, that is defects of form where the question of guilt or innocence does not arise. In fact that question is relegated to an entirely subsidiary position.



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